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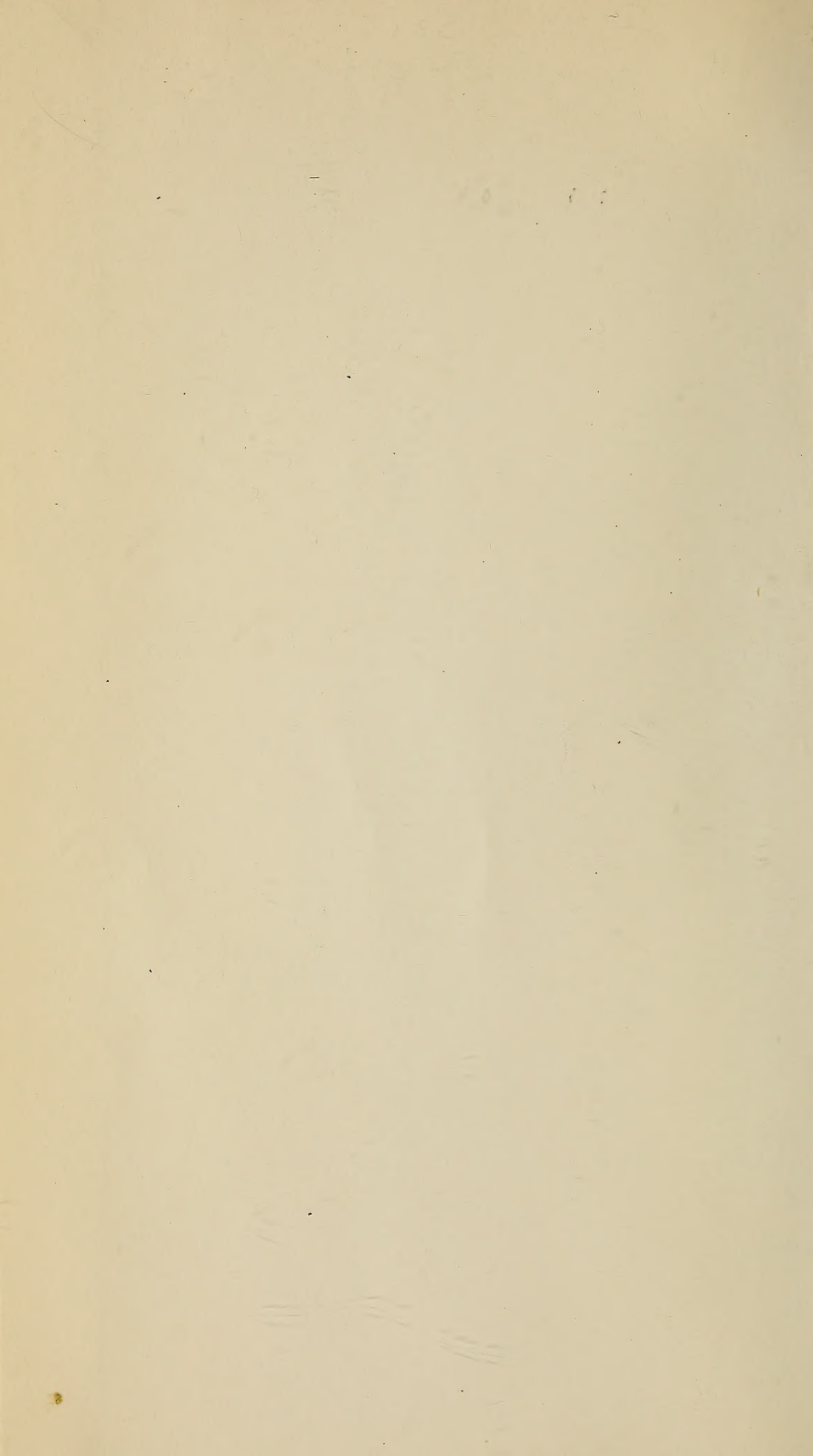














93

QUEEN'S BENCH  
AND  
PRACTICE COURT  
REPORTS.

[OLD SERIES.]

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*(From Manuscript Reports in Judges' Chambers.)*

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VOL. V.

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TORONTO:  
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KING STREET.

1855.

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# UPPER CANADA REPORTS,

OLD SERIES.

*(Commencing from the end of Mr. Draper's Volume of Printed Reports.)*

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## IN THE KING'S BENCH.

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CASES DETERMINED IN HILARY TERM, 6 WILL. IV.

*(Continued.)*

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Present—THE HON. CHIEF JUSTICE ROBINSON,

“ MR. JUSTICE SHERWOOD,

“ MR. JUSTICE MACAULAY.

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### MAGUIRE V. POST.

In case for illegal distress, the plaintiff is entitled to succeed on shewing that there was no such appraisement as the law directs, even though but for nominal damages.

Case brought by the plaintiff, whose goods had been distrained for rent, against the landlord, at whose instance the distress had been made. The declaration contained three counts. The first stated that defendant seized and distrained, &c., brick, &c., of plaintiff, found and being in and upon certain premises of plaintiff's, as for and in the name of a distress for certain arrears of rent alleged to be due to defendant for the use and occupation of the said premises; yet that the defendant did not cause the same to be appraised before the sale, but sold the same without it. 2nd count: For selling at an under value. 3rd count: In trover. Plea: General issue. At the trial at the last assizes for the Home District, it was proved that the distress had not been regularly appraised, and that the goods were sold for much less than their value. The jury were told that if they thought no improper conduct had been pursued in regard to the sale, the mere fact of the goods being sold at a sacrifice did not make the defendant liable



to an action. And as to the want of an appraisement, the statute doubtless required the assessment to be made; and if the plaintiff appeared to have sustained any damage from the omission in this instance he would be entitled to recover recompence for such damages; but that he could not say there was a clear right of action unless some damage had been received. The jury found a verdict for the defendant.

In Michaelmas Term last, *King* obtained a rule nisi to set aside this verdict for misdirection. *Sullivan* shewed cause. Judgment was now given.

The Court were of opinion that the bare fact of there having been no appraisement entitled the plaintiff to a verdict, though it were only for nominal damages; and they therefore made the rule absolute.—6 Price, 5; 2 Camp. 115; 3 Camp. 521; 1 Lord Ray. 53; 1 H. Bl. 13; 2 Bing. 334; 6 Mod. 629; 1 Str. 172; 4 Mod. 390; Bull N. P. 81; 1 Camp. 172; 1 Esp. Ca. 71; M. & M. 172; 1 Stark. N. P. C. 137; 2 Str. 873.

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#### SHERWOOD V. CAMPBELL.

Plaintiff agreed with defendant after action brought, that if defendant would take a note which plaintiff had given to a third person, it should be allowed for and on account of this action. Defendant did so, and by such payment and other items of set-off accruing before action brought, over-balanced plaintiff's demand. *Held*, that plaintiff was still entitled to a verdict with nominal damages, which would carry full costs.

Assumpsit. Plea, the general issue and set-off. The following point was raised for the consideration of the court. The plaintiff and defendant had mutual accounts. After this action was commenced, and before the trial, the plaintiff agreed with the defendant that if he (defendant) would settle a demand which a third person had against the plaintiff upon a note of hand, the same should be allowed to defendant for and on account of this action. At the trial the defendant shewed that he had settled and taken up this note; and he proved other items of debt due before action brought, which, added to this, overbalance plaintiff's demand; and he therefore claimed a verdict. The plaintiff, on the other hand, objected that the action



could not be barred by any payments made since it was commenced ; the issue being whether any sum was due to the plaintiff when he brought his suit. The set-off, he admitted, must of course be allowed to the full extent proved ; but as to this note, which defendant had taken up pending the action, he contended that it could only be allowed in reduction of damages, and might have the effect of rendering the verdict merely nominal, but that it would not be received to bar the action and thus throw the costs upon the plaintiff.

*Sherwood, H.*, argued for plaintiff, and *Bogert* for defendant.

The court were of opinion that, as in general the effect of payments made after action brought can only be to mitigate the damages, so there was no ground for giving any other operation to such a payment in this instance. It would be strange if a plaintiff, having commenced his suit, should agree to give such effect to a payment made afterwards as the defendant contends for here. It is not reasonable to presume that it was intended, but the contrary ; and the words of the written agreement of plaintiff support what we must suppose to have been the understanding under such circumstances ; for it expresses that the payment shall be acknowledged for and on account of the action ; and that the plaintiff was therefore entitled to a nominal verdict, which would however carry full costs.—3 T. R. 186 ; Holt, N. P. C. 6 ; 2 Taunt. 203 ; 4 E. 502 ; 4 B. & A. 345 ; 2 B. & A. 776 ; 5 B. & A. 886 ; 3 B. & B. 68 ; 2 Esp. N. P. C. 504 ; 2 Moore 30, 8 ; 8 Taunt. 146 ; Bull, N. P. 309.

*Per Cur.*—Postea to the plaintiff.

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#### HALL V. ARMOUR.

Evidence of one witness that he had seen the seal of a foreign court, and believed the seal affixed to document produced to be the seal of that court ; and of another witness, that he had been to the office of the foreign court and compared the seal which was shewn him by an officer of the court with that produced in evidence ; *Held* sufficient *prima facie* evidence of the judgment. Where a foreign judgment awards a certain debt and costs to be taxed, *Held* that such costs were recoverable in an action on the judgment, on proving the amount at which they were afterwards taxed.



Debt on foreign judgment, rendered in the Court of King's Bench for the District of Montreal in Lower Canada, for 95*l.* 9*s.* 8*d.*, together with 10*l.* 1*s.* 8*d.* costs of suit.

Plea—*nil debet*.

To prove the judgment, the plaintiff produced at the trial before Sherwood, J., at the last assizes for the District of Johnstown, a paper purporting to be a copy of the judgment, noted at the foot—"A true copy. (Signed) Reed, Levesque & Monk, P. B. R."—with a seal attached thereto bearing the inscription "Court of King's Bench, Montreal." There was also put in a bill of costs on a separate paper, taxed at 10*l.* 1*s.* 8*d.*, signed "Judge Pyke, J.K.B.," with a seal like the other attached to it. A witness was then called who swore that he had seen the seal of the Court of King's Bench at Montreal, and that he believes the seal exhibited to be the seal of that court. Another witness swore that he went to the office of the King's Bench at the Court House in Montreal, and there saw these two papers in the hands of an officer, and compared the seal with the seals shewn to him in the office, and believes them to be the same seal. The judgment awarded the debt, stating the amount, and awarded costs also—not however any specific sum, but leaving the costs to be taxed afterwards. It was objected at the trial that there was not sufficient evidence of the judgment, and the costs could not be recovered as forming part of the judgment, on account of their not being included in the entry of the judgment, but left to be ascertained afterwards. The jury found for the plaintiff.

In Michaelmas Term, *Bogert* obtained a rule nisi to set aside the verdict on the objection urged at the trial. *Draper* shewed cause. The opinion of the court was this day delivered by

ROBINSON, C. J.—We consider the judgment to be sufficiently proved, and that the costs are properly allowed; for they were awarded expressly in the judgment, though left to be ascertained by taxation before a judge, which is shewn to have taken place. It is reasonable to infer that such is the ordinary course of practice in this foreign court, where



the nature of the proceeding accounts for it. The judge tries the cause without a jury, and renders judgment for the demand at the trial. The costs, of necessity, must be afterwards taxed, and then by reference they become part of the judgment. There was no surmise against the existence of the judgment or the genuineness of the seal: the objection was that the evidence was not *prima facie* sufficient to sustain the verdict.—1 B. & Adol. 459; Str. 733; 1 Star. N. P. C. 515; 2 Star. N. P. C. 6; 3 Ea. 221; 1 Camp. 215; 1 Camp. 63, 255; 3 Camp. 215; 4 Camp. 28; 2 Stark. 11; 1 Doug. 1; 8 T. R. 17, 307; 4 M. & S. 20; 6 M. & S. 34.

SHERWOOD, J., and MACAULAY, J., of the same opinion.

*Per Cur.*—Postea to the plaintiff.

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#### FERRIS V. DYER & McDONELL.

In trespass for false imprisonment, a plea justifying the imprisonment under a *ca. re.* from a district court, but not stating an affidavit to have been filed on which such writ was issued, *held* bad on demurrer. No objection lies to a replication to such a plea—"that there was no affidavit of a debt certain duly made and filed," on the ground that it involves a negative pregnant.

A judge of a district court has no authority to order an arrest, upon an affidavit which disclosed a cause of action founded on a contract, on which the damages are unliquidated.

Trespass and false imprisonment. Plea—1st. General Issue. 2nd. The defendants justify under a *ca. re.* from the district court, saying that before the time when, &c., a writ of our Lord the King, called a *ca. re.*, was issued out of the Niagara District Court of our said Lord the King, directed, &c., in a plea of trespass on the case upon promises; and that defendant McDonell, as attorney for the other defendant Dyer, endorsed the said writ for bail for 10*l.* by virtue of an order of one of the judges of the said Niagara District Court, and an affidavit of the cause of action of the said Dyer in that behalf, before them duly made and filed of record in the said court, &c., according to the form of the statute, &c., whereon plaintiff was arrested. To this plea the plaintiff replies that defendants of their own wrong committed the trespasses, &c., without this, that any affidavit of the cause of action of the said Dyer, in "that behalf was before then made and filed of



record, according to the statute, "&c. Defendant rejoins, that an affidavit of the cause of action of the said Dyer, &c., was before then duly made and filed of record in the said Niagara District Court, &c., according to the form of the statute, &c., as they have in their plea alleged. In a 3rd plea to the 1st and 2nd counts, the defendants justify under a *ca. re.* from the district court (as before) endorsed for bail for 10*l.*, by virtue of an order of one of the judges, &c., saying nothing about an affidavit of debt. To this plea plaintiff replies, "that before the issuing the said writ there was no affidavit duly made and sworn by the said Dyer, his servant or agent, of the cause of action and of the amount justly and truly due to the said Dyer from the said plaintiff in any action of contract within the jurisdiction of the said district court, and duly filed, to authorize the issuing of the said writ and the said endorsement thereon for bail." The defendants rejoin, that "before the issuing of the said writ, there was an affidavit duly made and sworn by the said Dyer of the cause of action, &c. (affirming what the declaration denied, concluding to the country)" 4th plea—that before, &c., a certain writ of our Lord the King, commonly called a *ca. re.*, was issued out of the Niagara District Court of our said Lord the King before the judges thereof, the said court then and still being holden at Niagara aforesaid, &c., directed, &c., by which writ, &c., our said Lord the King commanded, &c., that he should take, &c., to answer the said Dyer in a plea of trespass on the case upon promises, &c.; and that McDonell, one of the said Defendants, as attorney for Dyer, the other defendant, duly endorsed the said writ for bail for 10*l.*, according to the form of the statute, &c., by virtue of which said writ, &c., sheriff arrested the plaintiff, which is the supposed trespass. Replication to this plea—"that before the issuing of the said writ there was no affidavit duly made and sworn by the said Dyer, his servant or agent, of the cause of action, and of the amount justly and truly due to Dyer from the plaintiff in any action of contract within the jurisdiction of the said district court, and duly filed with the clerk of the said court, to authorise the issuing of the said writ, &c., as in the 4th plea, &c.



To this replication there was a general demurrer."

The cause was tried, and contingent damages on the demurrer assessed at the last assizes for the Niagara District. At the trial, the affidavit was produced. It was a special affidavit setting forth an agreement to do certain work, and a breach and damages sustained in consequence—such an affidavit as clearly would not authorize an arrest in King's Bench without a judge's order. They proved also an order of a judge of the Niagara District Court for a bailable writ on that affidavit. And it was raised as a question of law and reserved for the consideration of the court, whether that evidence supported the defendant's pleas and the issue raised thereon.

This question and the demurrer thereon were argued in Michaelmas Term by *Burns* for the plaintiff, and *McDonell, R.*, for the defendants.

ROBINSON, C. J.—As to the demurrer, it is objected that the replication in stating that no affidavit was *duly* made and sworn, involves a negative pregnant, and is on that account vitious; but in *Dudley v. Watchhorn et al.* (16 Ea. 39), it was determined that a party may plead that no writ of *ca. sa.* was *duly* issued, where the object is to charge the bail; and besides the objection that a plea, contains a negative pregnant cannot avail on general demurrer. But the plea is clearly bad in not setting out an affidavit to warrant the *capias ad resp.* upon the principle that a party justifying under the process of an inferior court must shew that it regularly issued: the authority of such a court must be made to appear—nothing will be presumed. Moreover, the defendant, by demurring to the replication, admits that there was no affidavit to warrant the writ, and it is impossible to give judgment in his favor.—Willes, 37, note; Str. 993; 3 T. R. 183 1 Salk. 404, n.; 2 Esp. N. P. C. 642; Willes, 39.

As to the point raised at the trial: If the affidavit produced "be an affidavit of the cause of action, duly made according to the form of the statute," it supports the defendant's issue on the second plea. If it be "an affidavit of the cause of action and of the amount justly and truly



due the defendant Dyer in an action of contract within the jurisdiction of the said district court, and duly filed, to authorize the issuing of the said writ and of the said endorsement thereon for bail," then it supports defendant's issue on the third plea.

The statute 2 Geo. IV., ch. 2, says, "And whereas it is expedient to authorize the said courts to issue writs of *capias* in all actions within their respective jurisdiction, be it enacted, &c., that the said courts, &c., are hereby authorized and empowered to issue writs of *capias ad respondendum* in all actions of contract within their jurisdiction, &c. ; and in like manner to issue writs of *ca. sa.* on all judgments regularly entered in said courts," &c. The 9th clause—"And be it further, &c., that before any such writ as aforesaid shall be sued out, the same affidavits as may by law be required to authorize the issuing of a like writ from the Court of King's Bench in this province should be made before a judge of the district court, the clerk thereof, or before a commissioner of the King's Bench ; and the said affidavit so made shall be filed with the clerk." The district court is made a court of record, and authorized to hold plea in all matters of contract from 40s. to 15*l.* or 40*l.*, according as the demand is liquidated or not. The statute 2 Geo. IV. ch. 1, sec. 8 (the King's Bench Act), enacts "that no person shall be arrested or holden to special bail upon any process issuing out of the said court in a civil suit when the cause of action shall not amount to 5*l.* ; and when the cause of action shall amount to 5*l.* and upwards, *it shall not be lawful* for the plaintiff to proceed to arrest the body of the defendant, unless an affidavit be first made by such plaintiff, his servant or agent, of such cause of action, and the amount justly and truly due to the plaintiff from the defendant ; and also that such plaintiff, &c., is apprehensive defendant will leave this province without *satisfying the said debt*, &c., and the sum specified in such affidavit shall be endorsed on the writ, for which sum so endorsed the sheriff shall take bail, and no more." The 9th clause enacts that it shall be lawful for any plaintiff, having made such affidavit, to sue out from any commissioner in bank-



ruptey a writ of *ca. re.*, to which the affidavit shall be annexed; whereupon any constable may arrest defendant and deliver him to the sheriff. The tenth section enacts, that in all cases in which the cause of action shall be other than a debt certain, of which affidavit may be made as hereinbefore mentioned, it shall be lawful to hold the defendant to bail, a judge's order having been first obtained for that purpose in such cases and in such manner as is provided by the law and practice of the Court of King's Bench in England.

I think it clear upon these statutes that the district courts are only authorized to issue a writ of *capias*, &c., upon such affidavit as under the King's Bench Act will authorize—that is, will of itself authorize the Court of King's Bench to issue a *capias* to hold to bail; and equally clear that a *capias* to hold to bail cannot issue from the King's Bench upon any affidavit merely, unless it is an affidavit of a debt certain; for the 9th clause says that the act only authorizes that. The 10th section of the King's Bench act gives power to hold to bail upon a judge's order, saying nothing of an affidavit; but the District Court Act is silent as to judges' orders; and I think on the principle applying to courts of inferior limited jurisdiction, the power is not given to any such court, or judge thereof, by implication and construction. If construction could do it, I think such a construction not obvious upon comparing these statutes, but the contrary. Our Court of King's Bench could of its inherent authority arrest wherever it had jurisdiction. Its first process is in all cases *capias*; and the statute only restrains its power by preventing actual arrest on the *capias*, except in certain cases. The district courts by the statute have process by summons only in general, and except in so far as the act expressly gives it, have not and cannot have any power over the person. The act gives it in cases where such an affidavit can be made as is required in the King's Bench, to authorize the issuing of a *capias* (meaning rather to authorize the holding to bail on a *capias*). The King's Bench Act requires in terms no affidavit to arrest, except for a sum certain.



General practice under a statute is material. I never heard before of a judge's order to arrest in a district court, and I believe the District Court Act has not received such construction from any of the different judges presiding in the district courts. In my opinion, the defendant has not proved his issue, not having produced such an affidavit as is required in the King's Bench for authorizing personal arrest—that is, not having produced an affidavit of debt shewing the amount justly and truly due—such an affidavit as would of itself authorize bailable process in such court, without the intervention of a judge's discretionary order. The affidavit that is required in the King's Bench to authorize bailable process is an affidavit of debt in a sum certain—no other affidavit can authorize it. That a judge can authorize arrest without such an affidavit is certain; and it seems that in England he might do so without any affidavit, though it is ordinary practice to require one. And the same right can be exercised by a judge of this court, and in the same manner. Our statute expressly authorises it. The statute which creates and regulates the district court, on the other hand, does not authorize this, but I think prohibits it; and at any rate, no power over the person can be assumed by construction or inference by this inferior court, whose ordinary process is by summons. I think therefore the *postea* should be awarded to the plaintiff.

SHERWOOD, J., concurred with the Chief Justice.

MACAULAY, J.—The demurrer admitting the want of an affidavit, and no other authority for the writ being shewn, it would seem to follow that the justification is insufficient in law. The issues of fact are—1st. Whether an affidavit of the cause of action of Dyer was duly made and filed of record in the Niagara District Court according to the form of the statute, which requires the amount to be stated. 2nd. Whether an affidavit of the cause of action of Dyer, and of the amount justly and truly due to him from the plaintiff, was made and filed according to the statute. It may be questionable whether the affidavits should not be set out in pleading. The issue, as joined, may in a great



degree consist of matter of law. It is a question of fact whether any affidavit at all was made and filed ; but if so, it is one of law whether it stated the cause of action in compliance with the statute. Perhaps the plaintiff in his replication should strictly have set out the affidavit, &c., as inducement, and denied any other conforming to the statute, to which defendant should demur if in itself a compliance or a sufficient authority for the issue of the *ca. re.* and the arrest. The last issue, if a good one, clearly requires proof of an affidavit swearing to a sum certain in the ordinary way, and is not sustained. The only remaining question is, what is the substance of the first issue. By adverting to the English statute 12 Geo. I. ch. 29, and the decisions under it, it will be found that the affidavit of the plaintiff's cause of action requires the amount due to be specified in strict and unequivocal terms ; and an affidavit of the cause of action according to the statute here can only mean such an affidavit as is mentioned in 2 Geo. IV. ch. 2, sec. 9, and in 2 Geo. IV. ch. 1, sec. 8.

It appears therefore upon the pleadings to which the demurrer relates, that it stands admitted there was no affidavit conformable to the statute ; nor is any other proceeding shewn, which nevertheless authorized the issue of bailable process ; and under the issues, in fact, the affidavit offered in evidence is defective in substance upon the face of it, as not shewing a specific sum due upon the alleged cause of action—a fact, in short, which the nature of the transaction did not allow the defendant Dyer to state. Under these pleadings, the question is not properly raised whether upon such an affidavit as that produced it was competent to a judge of the district court to grant an order for bailable process in his discretion as to amount not exceeding 15*l.* To present that point, the affidavit and judge's order should have been set out as they exist, and have been relied on as authorizing and justifying the process and arrest. If that had been done, however powerful the argument against any extension of the jurisdiction of inferior courts created by statute beyond the strict letter of the act, or against the power of the judge of a district court to act



judicially in this matter out of court or in vacation, even could the court itself grant aailable process upon such an affidavit, I am not fully satisfied that such an authority is not fairly deducible from the two acts 2 Geo. IV. ch. 1 & 2 taken together.

The title, though indicative of the scope of the statute, is said to form no part of the law or act itself; it merely indicates the general subject of the law. Both these acts were passed at the same time; and so far as relates to the subject of arrest, should be construed in *pari materiâ*. They were passed to repeal part of and amend the laws in force respecting the practice of the Court of King's Bench, and to reduce into one act the several laws respecting district courts and regulating the practice thereof, and also to extend the powers of the said district courts. The general jurisdiction of this court is derived from the 34 Geo. III. ch. 2; and its general power to issueailable process is recognized in sec. 6 of that act, which is restrictive, and without which it would seem to have been competent to the courts to have issuedailable process under judge's orders in like manner as in England. Upon the repeal of that clause by 2 Geo. IV. ch. 1, the authority would seem clear; and inasmuch as the terms of the statute 2 Geo. IV. ch. 1, sec. 8, correspond with those of 12 Geo. I, ch. 20, which in 8th East was held not to restrict the former authority of the superior courts and the judges of them, the 10th sec. was not material to warrant the issue ofailable process from this court upon a judge's order obtained under the same circumstances as would be required to exist in England.

The 34 Geo. III. ch. 2, sec. 6, enacted that no person should be arrested or holden to bail upon any process issuing out of the court, &c., unless an affidavit were first made and filed by the plaintiff that the defendant was indebted to him in a sum certain, which, together with the account for which it became due, should be specified, &c. The early district court acts did not confer the power of issuingailable process at all. The 12 Geo. I. ch. 29, provided that no person should be held to bail upon process of the superior courts at Westmiuster when the cause of action



was not 10*l.* and upwards, or out of inferior courts unless to 40*s.* and upwards—the right of any inferior courts to issue such process being undoubted; and that when the plaintiff's cause of action equalled 10*l.* or 40*s.* or upwards as aforesaid, affidavit should be made and filed of such cause of action, and the sum therein specified should be endorsed on the writs. The 2 Geo. IV. ch. 1, sec. 8, also declares that no person should be arrested or holden to bail upon process of this court when the cause of action shall not amount to 5*l.*, and when it equalled or exceeded that sum it should not be lawful for the plaintiff to proceed to arrest the body unless an affidavit were first made and filed of the cause of action and the amount justly and truly due, &c. A comparison shews that the decision in 8 East applies to this clause of our act with even greater force than to the 12 Geo. I. The 53 George III., ch. 3, sec. 5, enacts that no *ca. sa.* should issue in any action unless an affidavit were first made and filed by the plaintiff, his servant or agent, that the deponent verily believed the defendant was about to leave the province with intent to defraud his creditors, or that he had secreted or removed his effects, or had made some secret and fraudulent conveyance thereof in order to prevent the same from being taken in execution. This was repealed by 2 Geo. IV. ch. 1, which in sec. 15 enacts that in all cases where a party is held to special bail it shall not be necessary to make or file any further or other affidavit before suing out a *ca. sa.*; and that, where the party has not been held to special bail, a writ of *ca. sa.* may issue after judgment upon an affidavit of the same form as is thereby required to be made for the purpose of suing out a *capias* in mesne process, or upon affidavit by the plaintiff, his servant or agent, that he hath reason to believe the defendant hath parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution. The 2 Geo. IV. ch. 2, enables the district court to hold plea in all matters of contract from 40*s.* to 15*l.*, and when the amount is liquidated or ascertained, to 40*l.* The 8th sec. recites that it was expedient to authorize the said courts to issue writs of *ca. re.* and *ca.*



*sa.* in all actions of contract within their jurisdiction; and enacts that they are empowered to issue such writs in all such actions. Sec. 9 further enacts, that before any such writ as aforesaid should be sued out (it does not say issued by the court, but sued out as it may be by the party), the same affidavit as may by law be required to authorize the issuing of a like writ from this court shall be made before a judge of the court, &c., and filed with the clerk, &c. This clause may certainly be explained upon satisfactory grounds, excluding a right to arrest under a judge's order. Writs of *ca. re.* and *ca. sa.* being both contemplated and different affidavits according to circumstances, sufficing in this court to warrant such writs, it may be said that no more was meant in that clause than that, whatever affidavit would entitle a plaintiff to sue out a *ca. re.* or a *ca. sa.* in this court, should equally authorize him to do so in the district court. Yet, if it be established that noailable process can issue from this court without an affidavit, although a judge's order be required in addition to some affidavits, as being made abroad, or stating a case of unliquidated damages, it may be argued with plausibility, at least, that a similar affidavit, combined with a like judge's order, should answer in the district court. The 2 Geo. IV. ch. 1, sec. 10, is couched in very general terms. It enacts that in *all* cases (not saying in this court only) in which the cause of action shall be other than a debt certain, of which affidavits may be made as previously mentioned, it should be lawful to hold the defendant to bail, a judge's order having been first obtained for that purpose, in such manner as is provided by the law and practice of the Court of King's Bench in England. If these two acts had been incorporated in one, and the clause had stood after the 9th sec. of ch. 2 instead of before it, or if it had preceded sec. 8 of ch. 1 instead of following it, little doubt could have been entertained touching the extent of the application. No very wild discretion would be imparted by it to the district courts; for where the demand is unliquidated, the jurisdiction extends only to 15*l.*, and no arrest could be allowed by a judge beyond that sum. The 12th sec. of



ch. 1 does not say the plaintiff shall be at liberty to hold the defendant to bail; but that in all cases not a debt certain, it shall be lawful to hold the defendant to bail—that is, for the court to do it at the instance of the plaintiff, a judge's order having been first obtained. The district courts may issueailable process in all matters of contract within their jurisdiction; but no such writ can be sued out until an affidavit be made and filed. Yet in all cases where no such affidavit can be made, it does not follow that a defendant may not be lawfully holden to bail, a judge's order being first obtained in such case and in such manner as is provided by the law and practice of the Court of King's Bench in England. The district courts are referred to the law of this court for the affidavits that warrant writs of *ca. re.* and *ca. sa.*, and may equally well be referred to the Court of King's Bench in England for the rule in such exceptions to the general course as may arise. The law and practice of the King's Bench in England, as it existed at the passage of these acts, became a statute law here; and by such law and practice, a judge's order for an arrest could be obtained without an affidavit; and I see no good reason why, in the spirit of the statutes of 1822, a special affidavit of the cause of action, omitting the specific sum, might not warrant an arrest upon a judge's order for a sum not exceeding 15*l*, in the district courts as well as in this.

If this cannot be done, then it follows that while sec. 8 of ch. 2 authorizes the district courts to issue writs of *capias* in all actions of contract within their jurisdiction, sec. 9 takes it away again, and restricts it to those cases only in which the plaintiff can depose to a debt certain, which, had it been intended, might have been at once so expressly declared. It could not be said of a *ca. re.* issued by virtue of a judge's order upon a full affidavit of circumstances, that it had not issued upon just such an affidavit or the same kind of affidavit as might by law be required to authorize the issuing (not suing out) a like writ under like circumstances from this court. No judge's order can be obtained in this court without an affidavit; such being the law and practice of the Court of King's Bench in England in 1822.



At common law, a defendant was not liable to be arrested upon mesne process for civil injuries without force, out of any court. Several statutes, however, enlarged the privilege of arrest. A plaintiff might arrest—1st. At common law, in trespass. 2nd. By 52 H. III. c. 23, in account. 3rd. By 25 Ed. III. ch. 17, in debt and detainue. 4th. By 19 H. VII. ch. 9, in case in the superior courts at least, and it would seem also in inferior courts by custom, and I should suppose equally by other lawful authority, which allowed the *capias* as process. By virtue of ch. 2, sec. 8, the district courts could issue bailable process in all cases of contract without any affidavit at all. Then, may it not well be argued that sec. 9, which enacts that no such writ shall be sued out without an affidavit, relates, like 12 Geo. I. ch. 29, to the plaintiff suing out process as of right, leaving to the court upon common law principles, and the spirit of ch. 1, sec. 10, the discretionary power of issuing such process in case of unliquidated damages under 15*l*. The language of the clause is comprehensive enough, and is not, in terms at least, limited to the Court of King's Bench in this province, which in truth required not the aid of any such authority. At the same time, I freely confess the opposite construction may be placed upon the 2 Geo. IV. ch. 2, for cogent reasons.—3 Dowl. 714.

*Per Cur.*—Judgment for plaintiff on demurrer, and the *postea* to the plaintiff.

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### FRIESMAN V. DONNELLY AND McLEOD.

In trespass for taking cattle—counts in the declaration not setting out the nature, &c., of things seized, but saying only “divers other cattle,” or “divers goods and chattels,” without further specification, *Held* bad on general demurrer. In trespass for taking the goods of A, plea of a *fi. fa.* against the goods of B., and that divers goods of B. were in possession of A. the plaintiff, wherefore defendant seized them, *Held* bad on special demurrer for want of an averment that they were the same goods. *Quære*—if such a plea amounts to the general issue.

Trespass against the deputy sheriff of the Niagara District and his bailiff. There were four counts in the declaration. 1st. For that defendants on the 1st of January, 1835, seized, took and drove away divers cattle—to wit, ten oxen, &c.—and converted them to their own use. 2nd. That



defendants on the same day and on divers other days, &c., seized and drove away divers other cattle (not specifying them), and converted, &c. 4th. That defendant on the 1st of January and on divers other days, &c., took down goods and chattels (not specifying what), &c., and converted, &c.

Pleas: 1st. General issue to the whole declaration. 2nd. To the whole declaration, that one C. W. sued out of King's Bench a *fi. fa.* against one M. F. for 21*l.*, returnable 1st of Hilary, which was delivered to defendant McLeod to be executed, &c.; that divers cattle, goods and chattels of M. F. were in possession of the plaintiff; and that under this writ McLeod, as deputy sheriff, and Donnelly as his bailiff, did seize and take the cattle, &c., out of the possession of plaintiff, and levied thereon the amount in execution, which are the said several supposed trespasses, &c. 3rd. A justification under the same process—the pleading in all respects the same, except that it sets out the judgment on which the *fi. fa.* issued.

Special demurrer to these pleas—assigning for cause, among other things, that they amount to the general issue, and that it is not averred that the cattle taken under the execution against M. F. were the same cattle, &c., for which this action was brought.

The demurrer was argued by *Sullivan* for the plaintiff in Michaelmas Term last.

ROBINSON, C. J.—It is clear that the second and fourth counts of the declarations are bad, because the goods taken are not specified in them, and this is fatal on general demurrer; but, as the pleas apply to the whole declaration, the plaintiff will be entitled to judgment on the 1st and 3rd counts, which are good, unless the special pleas are sufficient. We are all of opinion that both pleas are bad for one of the causes specially assigned—namely, the not averring the goods to be the same for which the plaintiff declares. The defendant has heedlessly framed his pleas upon some precedent where the intention was to justify the entry upon the close in order to take goods under an execution. Then it is of course sufficient to aver that certain goods of the debtor were on the close, and that defendant



entered to seize them ; but here the taking the goods is the whole cause of action, and the plea is no justification unless it shews a rightful taking of the same identical goods. The words in the conclusion of the plea—"which are the said several supposed trespasses," &c.—are not sufficient on special demurrer to supply the want of the precise averment. My brothers are of opinion that no objection lies here on the ground that the pleas amount to the general issue, since they consider the defendants by these pleas to have given color to the plaintiff when they averred that they took the goods out of his possession, wherefore they could properly plead specially their authority for taking them. I have doubts on that point. It is unnecessary, however, to determine it, as we are of opinion that the plaintiff is entitled on the other ground to have judgment on demurrer as to the 1st and 3rd counts of his declaration.

MACAULAY, J.—Doubtless the subject matter of this plea might have been given in evidence under the general issue, but I have not arrived at the conclusion that it amounts to the general issue. It involves, in the first place, various independent facts, any one of which being wanting would entitle the plaintiff to his action ; and partakes therefore of more complexity, and involves more legal questions, than a mere denial of the right of property ; and the right of property is not the only point in issue. The defendant must shew a judgment against M. F. and an execution against the goods of M. F. ; that it was delivered to the defendant as deputy sheriff ; that the goods belonged to M. F., or at least that they were liable to be seized under that execution.

The defendants give color even as respects the question of property, separated from the other material points. They admit the goods to have been in plaintiff's possession, upon which possession alone, as against the defendants, he could sustain his action, and the defendants could not defend themselves by proving property in M. F. without superadding the authority in law to them to take them, being M. F.'s. Neither do they allege them to be M. F.'s absolutely, but say that they were goods of M. F.'s liable to



be taken in execution, and in the possession of the plaintiff. It consists with this, that the plaintiff might have been the general owner as her vendee, or the qualified owner as her bailee, subject only to disturbance through the medium of a judgment and execution at the suit of an unsatisfied creditor, as to whom his title might be invalid in law. The defendants claim no interest in themselves, but seek protection under an authority in law as acting on behalf of a creditor against goods of a debtor found in the possession of the plaintiff, liable to the debt of such creditor. Take away the judgment or execution—in other words, cancel the right of the creditor—and the defendants are deprived of all defence, whether the right of property in the goods belonged to M. F. or not; for it would then appear that the defendants had tortiously taken without color of right or legal authority out of the plaintiff's possession, goods of which he was peaceably possessed, and apparently rightfully so. It would be a point indifferent whether M. F. or the plaintiff actually owned them. He might be in possession with her assent as vendee bailee or otherwise. It is not like a case where the defence is that the goods were owned and possessed by a stranger, and that defendant had no interest in or possession of the same, no right general or qualified, and no possession absolutely or constructively. Under such circumstances, a plea relying on such facts as a defence, would doubtless amount to the general issue, as denying any trespass at all as against the plaintiff, even *prima facie*.

But I consider the plea bad, on special demurrer, for uncertainty in the cause assigned. They do not allege that the cattle mentioned in the declaration and in the pleas were the same, nor what the goods and chattels consisted of, or that they were the same mentioned or alluded to in the third and fourth counts.

I concur with the Chief Justice in thinking the second and fourth counts bad for uncertainty, particularly the fourth, on general demurrer; the defendants could not, owing to the uncertainty, plead a recovery in this in bar of another action; so that the plaintiff is entitled to judgment only on



the first and third counts. If damages have been assessed on the whole declaration, no judgment can consequently be entered therefor, unless the plaintiff can procure the application of the verdict exclusively to those counts which are sustained.—1 Ventr. 272; Cro. El. 837; Fortes, 377; Str. 637; 2 Ld. Ray. 1418; 2 Ventr. 263; 2 Lev. 18; Burr. 2455; 7 Taunt. 642; 1 Moor. 286; 11 Ea. 576-8; 4 B. & A. 206.

*Per Cur.*—Judgment for plaintiff on the first and third counts.

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#### THE WELLAND CANAL COMPANY V. WARREN ET AL.

The Welland Canal Company may, on assumpsit, recover tolls for the use of the short canal at the mouth of the River Welland, which unites that river with the River Niagara near Chippawa, as that short canal forms a part of the Welland Canal.

Assumpsit brought for tolls upon passing through a cut near Chippawa, from the River Welland to the River Niagara, at the mouth of the former stream. The declaration stated the right to accrue to the plaintiffs for using and navigating part of the Welland Canal, and the defendants suffered judgment by default. At the assessment of damages, it appeared that this cut, commonly called the Chippawa cut, was begun in March 1829, and finished in the fall of that year, was passed by a vessel in December. The cut is eight feet deep, the mouth of the River Welland only four. No toll was proved to have been ever paid for passing this cut. It was made after the Welland Canal was finished. It is advantageous and ordinarily used. On the defence it was answered that this cut rendered access by the mouth of the River Welland more difficult, owing to a current setting out by reason of water let through the cut. Damages assessed at ——. A point was raised whether this cut formed part of the Welland Canal, and therefore whether the action could be sustained.

It was argued by *McDonell R.*, for the plaintiff, and ——— for defendant.

ROBINSON, C. J., gave no opinion.

SHERWOOD, J.—The only question for the opinion of the court in this case is, whether the Chippawa cut from the



River Welland to the River Niagara, near the confluence of the two rivers, forms a part of the Welland Canal.

There is no statute which expressly declares the Chippawa cut a part of the Welland Canal, but I think the 2nd and 12th clauses of the act 11 Geo. IV, ch. 11, entitled "An Act to grant a further loan to the Welland Canal Company, and to regulate their further operations," do necessarily imply the fact beyond a doubt.

I am therefore of opinion the assessment of damages in this case is correct.

MACAULAY, J.—An action of assumpsit would seem to lie for tolls, and I do not perceive that the record opens any question except the amount due upon an admitted claim.—1 T. R. 616. The declaration expressly alleges the cut uniting the Welland and Niagara rivers to be part of the canal in respect of which the toll is claimed, and this by the default stands admitted; the case is before us upon a mere assessment of damages, *not* upon an issue questioning the right. The court is not therefore, strictly speaking, called upon to express any opinion touching the right, but I have no objection to say that I am disposed to think the action would be maintained under the general issue. The question would be whether the short canal at the mouth of the Welland River forms a part of the Welland Canal, and the provincial statute of 1830, ch. 11, sec. 2 and sec. 12, would seem so to determine.

By provincial statute 1824, ch. 17, secs. 1 and 2, the Welland Canal Company was incorporated to construct two canals for boat navigation, the one between the Welland and Lake Ontario, and the other between the Welland and the Grand river or Ouse, as near the mouth as possible. By sec. 19 the line of the canal as laid down in the report of Hiram Tibbett is adopted, between Lake Ontario and the River Welland. By section five, the company, in constructing the said canal, are authorised to take and appropriate as much water as they may find necessary from out of the River Welland and the Niagara River, *and to erect at the mouth of the Welland a pier*, and at the point of departure of said canal from the said Welland, &c., such



wharves, &c., as may be necessary : provided that no such erection, &c., should obstruct the navigation of the said River Welland. Section thirty-six specifies the width of the canal. Section eighteen enables the company to regulate tolls. Section twenty\* authorises tolls when any part of the canal should be completed. Section three is very comprehensive in its powers, since it does not appear that the aqueduct at the mouth of the Welland was not expedient and proper for the purpose of facilitating the operations of the said canal.

This act manifestly contemplates the termini of the canals to be at their intersections with the Welland River, and merely authorises the erection of a pier at the mouth of that river, to improve the navigation thereof. It follows that some improvement at that point, for boat navigation, was in the outset deemed necessary and contemplated, and it was supposed a pier would answer the purpose.

The statute of 1825, ch. 2, sec. 4, for enlarging the canal for sloop navigation, authorises the construction of towing paths along the Welland and Niagara rivers, from the intersection of the canal with the former to the *mouth* of the Welland, and *from thence* to Fort Erie, without restriction upon the public in the use of the said river or the banks thereof, except being subject to the regulations of the company for preserving the towing path. Section seven defines the line of the canal as alluded to in the former act, section nineteen.

In 1829 the short canal from the Welland near Chippawa into the Niagara was made. The act of 1830, ch. 11, sec. 2, restricts the expenditure of 25,000*l.* therein mentioned to the payment of arrears and the completion of the said canal between Lake Ontario and the *mouth* of the said canal near *Chippawa* on the *River Niagara*. Section twelve provides that after the completion of the said Canal from Port Dalhousie to the entrance of said Canal into the said Niagara River, the surplus moneys might be applied in constructing a towing path along the Niagara River, from Lake *Erie* to the *entrance* of the Canal. Section two of the same act also recognises the feeder then in progress,



though not apparently included or contemplated in the first act.

It may not unreasonably be inferred that, upon the enlargement of the canal, a pier at the mouth of the Welland was insufficient. Wherefore the short canal was cut and apparently approved of by the Legislature, and designated as the mouth or entrance of the canal into the Niagara River. It does not appear that in constructing it the company have encroached upon private rights, against the provisions of the statute, or that they were not empowered to take under its provisions the land through which it passes; and although some evidence was received imputing to it a deterioration of the navigation by the mouth of the River Welland, yet it is not found by the jury to operate as a public nuisance, nor is the evidence sufficient to call upon a jury to draw such a conclusion. If the public rights are infringed, a direct proceeding, in order to prove and correct the evil, would seem the proper course. In the absence of any such course, and upon the evidence reported, I should conceive the plaintiffs at liberty to exact toll under the act of incorporation for the use of the short branch of the canal uniting the rivers Welland and Niagara near the mouth of the former.

*Per. Cur.*—Judgment for plaintiff.

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#### HAMPSON V. BOULTON.

*Quære*—Whether the evidence of the Secretary of the Province, that it appears by an entry in his own handwriting, in a book kept for such entries, that a patent was delivered to A., and that he therefore felt sure it was delivered to A. or his servant, (but has no recollection of it,) is sufficient to charge A. in trover with the possession of such patent? And whether, if A. obtained this without any direction or authority from the grantee of the crown, but from the direction of some public officer to the secretary to deliver to A. such patents as he should require, such obtaining possession of the patent was tortious and afforded evidence of a conversion at that time?

Trover for the conversion of a government patent granting to the plaintiff in fee simple, under the great seal of the province, the west half of No. 11, in the 10th concession of Goulburne, in the District of Bathurst, dated the 7th July 1828.

Pleas—Not guilty, and the Statute of Limitations.



The cause was tried before Macaulay, J., at the last assizes for the Home District.

To prove the existence of such a patent and its receipt by the defendant, the Secretary and Registrar of the Province, in whose office grants of land are engrossed, sealed and registered, was called, and stated that, as secretary of this province, he issued to the defendant a patent of that date granting to the plaintiff the land mentioned, together with a number of others. The land was granted to the plaintiff in fee as a military claimant. He produced a book from his office, in which was contained an original entry of the general issue of patents, specifying the name of the grantee, the number of the lot, the person to whom delivered, and the date, &c. In this book was entered, in the handwriting of witness, the patent in question, as delivered to the defendant with several others at the same time, some of which were entered before and others after that to the plaintiff. The secretary issued this patent from his office on the eve of an election in the District of Bathurst, and said that numbers of deeds were delivered out to the defendant and others, and that the witness had been ordered to give to the defendant all the deeds he asked for, to forward to his brother at Perth, but he explained that he had no distinct recollection of delivering to defendant the particular deed now in question, but finding it entered as appears in the book exhibited, he felt safe in believing it was delivered as noted; he admitted that mistakes might occur in the entries, under peculiar circumstances, but did not seem to apprehend any error on this occasion. He explained that patents to be delivered for settlers in the Bathurst District were made up in parcels, and supposed all those entered as delivered to defendant at the same time as the plaintiff's were put up in one parcel. To a question from the court he replied, that he must have delivered the patent to the defendant personally or sent it by his servant, the witness having no messenger attached to his office. He also stated, on cross-examination, that patents had been sent to Colonel Burk in the Bathurst District; that he did not know he was an agent for getting out government deeds, but that



many were entered in his books as issued to the Quartermaster General's Department, which might have been sent to Colonel Burk as authorised through that department. He further said that the plaintiff came to him respecting his patent several times, saying that the land was worth little and that he wished to surrender it, and the witness informed him that if the grant had been lost it could not affect his title, and that an exemplification could be obtained for 2*l.* 14*s.* The witness thought he had spoken to defendant on the subject, but could not recollect anything that had passed. On his re-examination he said he had no doubt but that the patent had issued to the defendant. A clerk of the plaintiff's attorney produced an original letter from that attorney to the defendant in the following terms :

"City of Toronto, 9th February 1835.

"Sir,—As the attorney for Israel Hampson, I hereby demand of you forthwith to deliver up to me the patent or deed issued by his Majesty's Government of Upper Canada in the name of Israel Hampson, and for the said Israel Hampson, for the west half of lot No. 11, 10th concession Goulburn ; and unless the same be immediately delivered to me, I have instructions to institute legal proceedings against you for its recovery, or damages for its detention.

"Yours, &c.,

"P. JAMES KING.

"To D'ARCY BOULTON, Esq."

The witness said he knew the plaintiff, who instructed Mr. King to proceed against the defendant, owing to which the letter produced was written in duplicate, one of which, signed by Mr. King, was by the witness delivered to the defendant on the 9th of February last ; that the other now produced was not then exhibited, but that witness drew out both of them and knew that the contents of both are alike. The defendant gave no answer to the witness further than saying very well ; he said nothing about the plaintiff's patent ; and it did not appear that any answer was ever received to the communication, by the plaintiff or his attorney. The defendant's counsel objected to the reading of the foregoing letter without notice to defendant to produce the one served on him, which Macaulay, J. was disposed to think a good exception, but being unwilling to stop the cause he heard it, subject to the point.



On the defence it was objected : 1st. That if the supposed conversion consisted in receiving the patent from the secretary's office, it was more than six years before action brought, and so barred. 2nd. If it consisted of an implied conversion recently, to support which Mr. King's letter was submitted as evidence, that no sufficient authority in Mr. King to make the demand was proved, and that there was no evidence of any refusal. Upon this exception, Mr. King's clerk was recalled, who repeated his former evidence that the plaintiff had authorised Mr. King to take whatever steps he deemed expedient in his behalf touching the deed, and added that he delivered the letter personally to the defendant, who made no reply and gave no answer. 3rd. That there was no proof of the patent's being in the defendant's possession when the letter of Mr. King was delivered, without which no inference of a conversion could be drawn from its non-delivery.

Macaulay, J., said he considered the secretary's evidence *prima facie* sufficient proof to go to the jury of the defendant's having received the deed, and that it was for them to say whether he continued to hold it till the receipt of Mr. King's letter of demand. For the defence a witness was called, who said the plaintiff called upon him several times about the deed, and that he promised to inquire after it ; that a letter was at last written to Colonel Burk, either by defendant or witness, who with the answer sent plaintiff's patent, which the witness produced in court together with Colonel Burk's letter, which the defendant desired to have read. This was not allowed, as being the mere relation of a competent witness not upon oath. The witness said he understood Colonel Burk was an agent of emigrants, and on cross-examination said he did not know who gave the deed to Colonel Burk. Macaulay, J., did not think the plaintiff's case sufficiently established, owing in a great measure to what he considered the insufficient proof of the letter of the attorney to the defendant, and the weakness of the presumption after the defence that the defendant had possession of the patent when that letter was received. The plaintiff's counsel, however, desired to go to the jury,



and it was left to them on the whole evidence. The judge charged that in his opinion the first question was, whether the defendant had ever received the deed; that he considered the secretary's evidence proper to go to them in support of the affirmative—but it was to be considered, in connexion with the fact on the defence, that the deed had lately come from the possession of Colonel Burk, a person to whom such a patent might have been transmitted originally in the course of office as being for a military claimant, but that it was not in evidence when or from whom it actually came into his hands; that if, in their opinion the defendant did receive it as stated by the secretary, he did not think him guilty of a conversion by merely taking it from the office, because its issue to him was authorised by the government to be sent to the plaintiff; that a conversion imported a wrongful act, and that at the utmost he could only imagine the defendant received it inadvertently, if not authorised to take it out on plaintiff's behalf through his brother, and that it appeared to him it had afterwards miscarried or been lost sight of inadvertently and without any wrongful motive towards the plaintiff; that if he received it originally, the next inquiry would be, whether he had afterwards wrongfully converted it within six years, which might perhaps be done by sending it without authority to Colonel Burk, and certainly by withholding it after demand; that a non-delivery of it in a reasonable time after Mr. King's letter would afford evidence of a conversion, provided he had it in his possession at that time; that the evidence of such possession was but a presumption, arising from his having received it six years previous to send it down to the plaintiff in the Bathurst district, through his brother at Perth; that after seven years the presumption of a continuance of life of a person unheard of changes, and that, though less than seven years, still from the lapse of time in this case it was not readily to be inferred that the defendant retained the deed all the time wrongfully and without adequate motive, as its possession could impart to him no interest in the estate, which in itself appeared of little value, and the deed could be exemplified for *2l. 14s.*; that the presumption was much



weakened from the circumstance that about the period of Mr. King's letter, apparently soon afterwards, the deed was received from Colonel Burk below—a fact well calculated to excite the apprehension that it may have gone to him originally, or have come to him through the defendant long before the demand in February last; that if the jury arrived at the opinion that the defendant had within six years wrongfully disposed of it, or wrongfully withheld it from defendant after request made—being in possession of it and capable of complying with such request—such conduct would offer evidence of a conversion; though he did not from any improper motive or object seek actually to appropriate it to his own use; that the plaintiff had manifestly experienced much trouble in finding his deed, but that the defendant's liability in trover did not follow, unless he was wrongfully the cause of it. Before retiring, the foreman of the jury said he believed the impression of the jury was general that the defendant had not sought to convert the deed to his own private use, but that the plaintiff had been vexatiously kept out of it. Macaulay, J., then said the question would be, who had vexatiously kept him out of it? If the defendant within six years, it would be conversion enough to support the action; but that to impute to him, it must be found that he not only received the deed from the Provincial Secretary, but wrongfully withheld or disposed of it within six years before action brought.

The jury found for the plaintiff, damages 5*l*.

In Michaelmas Term, *Spragge* obtained a rule nisi to set aside the verdict and grant a new trial, on the following grounds:—1st. That the evidence of the patent being in defendant's possession was insufficient. 2nd. The taking (if at all) in 1828 being unauthorized, there was a wrongful conversion at the time; and being barred by the Statute of Limitations, plaintiff cannot go upon the subsequent conversion in 1835. 3rd. The best evidence of demand in 1835 not given. 4th. Authority of agent making demand not proved, or that defendant knew him to be agent. 5th. No refusal proved, or that patent was in defendant's possession at the time of demand made. *King* shewed cause.



ROBINSON, C. J., gave no opinion.

SHERWOOD, J.—I incline to think that all the objections taken by the defendant, except two, are unsustainable. The two to which I allude are:—1st. Evidence of patent being in defendant's possession insufficient. 2. The taking (if at all) in 1828 being unauthorized, there was a wrongful conversion at the time; and being barred by the Statute of Limitations, plaintiff cannot go upon the subsequent conversion in 1835. Upon the evidence of the secretary, that he must either have given the parcel containing this deed to the defendant personally, or sent it by his (defendant's) servant, there appears to be an uncertainty as to what person the deed was delivered—whether the defendant or his servant. According to the testimony, it is quite possible it may have been given to the servant; and if it were, it becomes necessary to examine whether the evidence was sufficient to sustain the action. Supposing the deed was delivered to the servant, I incline to think there should have been some testimony to shew the servant afterwards delivered the deed to the defendant, or that the servant had authority from the defendant to receive the deed for him. This authority should have been proved, either by shewing an order from the defendant to the servant, or by establishing that the defendant was in the habit of sending the servant to carry or receive written instruments for him, if that were the fact; or that he was employed by the defendant generally. To charge the defendant in trover, possession should be proved in the defendant himself—delivery to a servant is not sufficient, if it be not proved that the goods came to the defendant's hands, unless it be proved that the servant is employed generally to receive articles for the defendant. Here no such evidence was adduced, and no actual possession was proved in the defendant.—Bull N. P. 44.

The other objection seems also to merit consideration. The defendant contends that if he ever took the deed—the taking being unauthorised—there was a wrongful conversion at the time, and the action was barred by the Statute of Limitations.



If the defendant received the deed at all, it was probably on the 7th July 1828, more than six years before the commencement of the present suit. The secretary of the province stated in his evidence that he had been ordered to give the defendant all the deeds he asked for, to send to his brother in the district of Bathurst. Who gave the order, or whether written or verbal, does not appear. I understand, however, from the evidence, that the direction was given by the executive government; and I will consider the case in that way, in order to examine the rights of the plaintiff as the grantee of the crown of the lands mentioned in the patent. It is a principle of law that the king is bound by his own and his ancestor's grants, when valid, although they be made without consideration, except in cases where a mere authority, license or exemption is given without an interest.—L. Ray. 32; 2 T. R. 515. The king's patent under the great seal is a record *per se*, and conveys the estate to the grantee without further act; and I consider, therefore, that the estate in fee in the land mentioned in the patent in question, as soon as the great seal was affixed, was in the plaintiff. This being the case, I think it clearly follows that the patent itself was also the property of the plaintiff, and he had the right to the possession of it. In the case of private persons, the vendee of real property is of course the owner of the deed which conveys him the land, and he has also a right to all the title deeds of the estate, if the grant to him be without warranty.—Co. Lit. 6 a; 6 Taunt. 14. After a grant from the crown is made out, under the great seal of the province, of real property, in case there be no objections whatever on the part of the crown to the legality and validity of the grant, I think it remains in the office of the secretary of the province, for the use of the grantee and subject to his order. The secretary perhaps may legally appoint deputies or agents in different parts of the province when directed to do so, for the purpose of more conveniently delivering grants of real property from the crown to the respective grantees, and transmit such grants to such deputies or agents, with instructions to hold them subject to the order of the grantees;



but then it appears some of the patents would still be considered in law in the possession of the principal.

In the present case, however, it was not proved that the defendant or his brother was the deputy or agent of the secretary, and indeed that was not alleged to be the fact; and the question therefore is, whether the order to deliver the grant to the defendant or his brother was strictly legal. It appears to me there is an essential difference in law between the giving the grant to a public and known officer who is the deputy or agent of the secretary, and the giving it to a private and unauthorized individual. In the former case the possession would still be in the secretary, and the grantee would know to whom he should apply for the deed; but in the latter he might be exposed to the danger of losing his deed altogether, as well as to great trouble and expense. Such a course might, consequently, be attended with much public inconvenience as well as private detriment; but I do not rest my opinion on this ground alone. It appears to me the crown, having no objections to the grant itself, could have no disposing power over it for the purpose of changing the possession of the secretary to that of a mere stranger. I incline to the opinion that no one could legally change the possession but the plaintiff himself, or his authorized agent. The taking of the deed by the defendant, without such authority, from a person having no legal right to deliver it, for the purpose of sending it to his brother who was also unauthorized, appear to me to be a tortious act amounting to a conversion, for which an action would lie without any previous demand.—6 T. R. 298; 6 Ea. 540; 2 B. & A. 702; 3 B. & A. 686; 1 Stark. 173; 2 Stark. 307.

The evidence therefore sustains the second plea, according to my view of the case, and a new trial should be granted I think without costs.

MACAULAY, J.—As to the first point, I think there was evidence to go to the jury. The secretary, though he did not speak from memory, spoke from an entry in his own handwriting, made in the ordinary course of his office, and said the deed was so entered as delivered to the defendant; having no present recollection he could not speak of the fact



of delivery itself, nor say it was to the defendant personally, but that it must have been to himself or his servant, the office having no messenger. The presumption is upon the entry that the deed was delivered to the defendant.—3 T. R. 754; 2 Camp. 112; 1 Ea. 460; Sal. 441.

2nd point. I do not consider the receiving the patent originally a conversion. It was received from the government officer, in whose custody it was by authority of the government, on the supposed behalf of the patentee, or at all events to be sent or delivered to him; there is no evidence to shew any deceit or ill motive; and although the defendant may not have had the plaintiff's leave or directions to obtain it, yet I cannot say that if the defendant supposed he had, as being instructed perhaps through his brother at Perth, the act constituted a conversion.—Sel. N. P. 1289; 3 B. & A. 685; 6 Ea. 540; 2 B. & P. 439; 3 B. & B. 2; 1 D. & R. 234; 4 T. R. 250; 4 Esp. 20. It was placed in his hands by authority of government, through the officer with whom deposited, and was received by him in order to its transmission and delivery to the owner. There is no evidence of any *mala fides* in the defendant; and I cannot suppose that every one who takes charge of a patent with the sanction of the government to convey it to the grantee immediately becomes liable to an action of trover, unless such person could prove an express authority from the owner to take up the grant.—7 D. & R. 729; 5 B. & C. 149; 2 C. & P. 471; 3 C. & P. 34. I should think a refusal afterwards, or some wrongful or injurious act in relation to the trust assumed, must occur before a wrongful conversion could be imputed to the bailee or depositee of the deed, under the circumstances, and with the views and objects above supposed.

3rd. point. I think the evidence of a demand sufficient, on the authority of the cases given below, by the production of a duplicate original, without notice to produce the one actually delivered. I do not perceive any substantial difference between a formal notice and demand of this kind, or the notice of the dishonor or nonpayment of a bill or promissory note, or of action against a magistrate—as



respects the mode of proving the purport and service of such notices respectively.—1 Star. 167 ; 3 B. & B. 288 ; 2 B. & P. 39, 41-2, 237 ; 1 Esp. 455-6 ; Peake, N.P.C. 166 ; 2 Camp. 110.

4th point. I think also the authority of the agent was sufficiently proved.—1 Esp. 115, 83 ; 1 Camp. 478 ; 3 Ea. 381.

5th point. The forbearing to answer the letter of demand after a reasonable time is a refusal. And it would seem a matter for the jury to say, from the evidence, whether in point of fact the patent continued in his possession up to and at the time of the receipt of Mr. King's letter, or had been wrongfully parted with within six years before the action. The demand is evidence too, to shew that the plaintiff did not desire to repudiate the defendant's agency in the first instance, or that at all events he did not seek to treat the receiving the deed as a wrongful conversion.—1 Camp. 439 ; 1 Esp. 22, 31 ; Gow. 69 ; 1 Stark, 167 ; 5 Burr, 2827 ; 4 Bing. 722 ; 1 M. & P. 761 ; 1 M. & R. 2 ; 7 B. & C. 310.

The issues must be regarded separately, and the evidence be applied to them in succession. 1st. Under the general issue the questions are, whether the defendant ever received the patent at all, and if so, whether he converted it at any and what time—that is, by reason of the original acceptance of it, or at any future period. To sustain this issue, the plaintiff was bound to establish both a taking and a conversion ; either wanting, the defendant would be entitled to a verdict. I cannot say there was not evidence to go to the jury in support of both, and they have found accordingly.

2ndly. Under the plea of the Statute of Limitations the facts of a receipt and conversion are admitted, and the only question is, when did the conversion take place—within six years or previously ? If it consisted in the first receiving, it was more than six years before the suit, and the defendant would be entitled to a verdict. If within six years, by reason of a wrongful disposal within that period, or by neglect to deliver it over upon demand made after reasonable time, the plaintiff would be entitled to succeed, I



have said I do not regard the original possession of it a conversion in *limine* ; but I cannot say there was not evidence to go to a jury from which a conversion (by a wrongful disposal or a continued possession, accompanied with an unauthorized or vexatious withholding of it afterwards) might be inferred, however I myself might be inclined to deem a contrary conclusion better warranted. The jury have drawn the unfavorable conclusion against the defendant, and if there was evidence to go to them sufficient for them to consider, and sufficient to justify such an inference, though tending more strongly perhaps the other way, (and I cannot say there was not,) the smallness of the damages preclude the court from granting another trial. It could only be allowed if the court were enabled to say the verdict was wrong in point of law, or contrary to the evidence, and I cannot say so ; however, upon the whole, I myself as a juror might have been disposed to adopt an opposite view, I cannot say the verdict was perverse or unconscientious. I cannot say it was wrong in law or unwarranted in fact, though I might have been better satisfied with a contrary result. Under such circumstances I believe a new trial cannot be afforded, consistently with precedent and authority.

The court being equally divided, *Spragge* took nothing by his motion.

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#### GORDON V. FULLER.

When a defendant, being in custody on mesne process, put off the trial at one assizes, and at the approach of the following assizes—after being apprized that the plaintiff had neglected to give notice of trial—pressed that the record might be entered low on the docket to give him time to procure a witness, and it was so entered, but could not be tried for want of time : *Held*, that defendant was not supersedeable, because the cause had not been tried within three terms.

This cause stood for trial at Toronto, in April 1835, and was put off on defendant's affidavit that one Walsh, residing in Dublin, was a material witness for him, and that he expected to be able to procure his attendance at the next assizes. Defendant had been arrested in this suit on 15th October 1834, for 4,478*l.* 6*s.* 10*d.*, and has been and still is in close custody in the gaol of the Home district. The declaration was served the 29th December 1834, and issue



was joined in the vacation after Hilary Term 1835. The next assizes were on 13th October 1835. On the 3rd, the clerk of defendant's attorney informed defendant notice of trial had been served, and defendant in consequence prepared for trial; but on 10th October was told by the said clerk that he was under a mistake, and that notice of trial had not been served. Defendant then urged the clerk to do all in his power to have the trial brought on. The defendant also swears that he instructed his own attorney on the 12th October to get plaintiff to enter the cause, and to have it brought to trial if possible. On the 14th defendant was informed the cause was on the docket, and on the 19th he took out a subpœna for a witness and had it served, and did all he could to force the cause to trial, and further requested his attorney to have the cause so placed as not to be tried till the end of the second week of the assizes, in order that he might get a witness from Niagara. The cause, however, was not tried, as the assizes were ended before it came in its order on the docket for trial.—3 Wills. 456; Barnes, 383; 1 E. R. 410; 1 Taunton, 59.

And now the defendant's counsel, *Small*, moved for a supersedeas, because the plaintiff had not brought on the cause to trial within three terms. The defendant's attorney made an affidavit that he did not waive the want of notice of trial, but referred the plaintiff's attorney to the defendant himself, and only suggested that plaintiff should enter the record, so that if defendant wished it the cause might be tried.

*Sullivan*, in answer, shewed that the clerk of the defendant's attorney desired the cause to be entered last on the docket, that defendant might obtain a witness from Niagara, which was done; that it remained untried in consequence, the assizes having terminated without finishing all the civil causes; but that if it had been entered with the other causes of plaintiff's attorney it would have been tried.

The opinion of the court was delivered by

ROBINSON, C. J.—I think the plaintiff was entitled to try his cause, though he had omitted to give notice—because defendant waived it and urged him to try, and expressly



consented to his entering the cause. The cause not being in fact tried, was no fault of the plaintiff's ; it arose from the defendant having had it placed low on the list for his convenience. The plaintiff, I know, repeatedly urged the court to take it, but it was necessarily left, as those before were entitled to be called first. Under such circumstances there is no right to be superseded.

*Per Cur.*—Rule discharged.

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### DOE EX DEM. BAKER V. GOULD AND GOULD.

The court refused to set aside a nonsuit when defendants and their ancestor had been twenty years and upwards in possession, where it appeared that the patent for the crown had been issued more than twenty years, and it also was shewn that the ancestor of the defendants had been allowed his claim, under the Heir and Devisee Act, for the land in question, though two or three years afterwards the patent issued in another name, but with a description that did not accord with that of the person under whom the plaintiff claimed.

Ejectment for lands in the Midland district. The following facts appeared in evidence at the trial at the last assizes. One Abel Gould, a blacksmith, claimed title before the land commission in 1799, and was allowed the premises in question as assignee of the original nominee of the crown. He neglected, it seems, to sue out his patent, or to inquire for it at the proper office ; but he lived upon the lot, and dying upon it, his sons, the defendants in this cause, continued to occupy it. In 1802 letters patent were completed by mistake in the name of Abel Gates, for this lot, describing him as Abel *Gates* of the *town of Kingston*, blacksmith—whereas Abel Gould was the person meant. There was an Abel Gates living at the time the patent issued, and he was also a blacksmith, but he resided not at Kingston, but in the township of *Pittsburg*. At the last election for the county, and after the defendants had been in actual possession of the lot for forty years uninterrupted, the existence of this patent, which had been erroneously issued from an accidental confounding of name, became known. Gates was dead, and his heir assuming that he could make a title, conveyed to the lessor of the plaintiff. The patent did not on the face of it shew on what authority it issued (as is usual in more recent patents), but it was proved upon the trial that it was completed upon a description framed upon



the commissioners' report, in 1799, to Abel Gould. Under these circumstances the plaintiff was nonsuited.

In Michaelmas Term, ——— moved to set aside the nonsuit, contending that the patent must by its terms prevail to pass the estate to Abel Gates.

———— shewed cause on the following grounds:— That the patent could not legally issue to any other person than the claimant, who was allowed it by the commission; and that being made contrary to the Heir and Devisee Act of 1795, is void. That there was an adverse possession of more than twenty years. That the heir of Abel Gates could not convey, as he had never entered, and there was a stranger in possession; and that the mistake in the patent might be explained by extrinsic evidence.

*Per Curiam.*—Without going into other points, it is quite clear that the Statute of Limitations has given a good title to the defendants, and that the nonsuit therefore was proper. If there was no such person as the grantee is described to be in the patent, then no person took under the grant, and the lessor of the plaintiff has shewn no title. If the patent did not vest the estate in Abel Gates of Pittsburg, then the estate was out of the crown in 1802, and the Statute of Limitations began then to run. The Chief Justice also thought that this case might if necessary be very satisfactorily settled on this ground, that the heir of Abel Gates proved no title; that his ancestor does not answer the description in the patent; and that the presumption which usually arises from mere identity of name was rebutted in this case by positive testimony that Abel Gates of Pittsburg was neither the grantee, nor intended to be the grantee in this patent.

*Per Cur.*—Rule discharged.

#### ALDERMAN V. WEST OF SCOTLAND INSURANCE COMPANY.

In an action against an Insurance Company for a loss by fire, the declaration averred that certain affidavits required by the conditions of the policy were made by A. B. and C. D. *Held*, that proof of affidavits by such parties was indispensable, as well as that the affidavits should strictly conform to the terms of the policy.

This was an action on a policy of assurance against fire. The defendants had accepted a declaration and pleaded.



The policy contained a stipulation, that in cases of accident by fire the person insured should within one month furnish to the agent of the company proof on affidavit of three persons who were present at the fire of the circumstances of the accident, extent of the loss, &c. In the declaration it was averred that affidavits of three persons named in the declaration were furnished according to this stipulation; but at the trial before the Chief Justice at the last assizes for the Home district, although proof was given of three affidavits furnished within the time—two of them were by different persons from those named in the declaration. It was not stated nor proved that they were present at the fire, and they did not all contain the statements of the nature and extent of the loss required by the policy. The Chief Justice nonsuited the plaintiff for the failure in his evidence, and in Michaelmas Term last a rule nisi was moved and obtained, returnable this term, to set aside this nonsuit; but the court expressing a strong conviction that the averments were material, and that the proof of them was indispensable to the right of the plaintiff to recover, the plaintiff's counsel declined arguing the point, and the court discharged the rule.

For plaintiff, *Sullivan*; and *Draper* for defendant.

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LEEMING ET AL. EX'ORS. OF — LEONARD, ESQ., SHERIFF  
V. HAGERMAN, ONE, &C.

Where an execution against lands was put into a sheriff's hands before the return day—but it was not shewn that the sheriff did anything upon it—and the plaintiff and defendant compromised: *Held*, that the sheriff was not entitled to poundage on such execution, although the defendant had lands within his district which might have been taken upon such writ and sold.

Assumpsit. In the first count of the declaration the plaintiffs declared for certain fees, perquisites, poundage and sums of money, before that time due and owing from defendant to testator, as sheriff of Niagara, upon and for the *execution of divers writs*, precepts and processes, for defendant, &c. The second count was for the work and labor of testator, as sheriff, in and about the executing and serving the said writs, precepts and processes, and in and about the service, *execution*, and levying of the goods and



chattels, lands and tenements, of divers persons, by him the said testator, his deputies, &c., under and by virtue of the said writs, and at the request of defendant, &c.

Plea—the general issue.

This action was brought to try the right of poundage upon a writ of execution against lands, under the following circumstances. Gates and others had recovered judgment in an action against Crooks, and in another action against Cummings; and the defendant, as attorney for the plaintiffs, had placed writs of *fi. fa.* against lands, in each case, in the hands of the sheriff of Niagara (plaintiffs' testator). The debt in each case was afterwards settled between the plaintiffs and the defendants by a compromise. It was not shewn that the sheriff had done anything more than receive the writs, which were placed in his hands before they were returnable; and upon the trial of this action, which was brought against the defendant as the attorney who placed the writs of execution in the sheriff's hands, a verdict was taken by consent for the whole amount of poundage in the one case, and for poundage upon the estimated value of the lands of the defendant in the district of Niagara which could have been sold under the writ, in the other case—subject to the opinion of this court whether under such circumstances poundage could be recovered.

The case was argued by *Baldwin* for plaintiffs, and the *Solicitor General* for defendant.

ROBINSON, C. J.—I cannot see on what principle this action can be sustained. Clearly, the common law would give the sheriff no fee, and therefore no action; because the general principle is, that all officers employed by the king in the administration of justice are to serve without fee, unless when the legislature directs otherwise. Several early statutes were passed in affirmance of the principle, and expressly prohibiting the sheriff from taking any fee or reward, except from the crown. No assumpsit results from the service; no *quantum meruit*, as in other cases, for the labour. Express legislative authority must be shewn for the charge.—1 M. & S. 296.

In England this question must be governed by the statute



28 Eliz. ch. 4, which provides that "it shall not be lawful for any sheriff, by reason or colour of his office, to have, receive or take from any person, for the serving or executing any extent or execution upon the body, goods, lands or chattels, more, &c., or other consideration or recompense than in that act is limited and appointed—that is to say, 12*d.* for every twenty shillings, when &c., and 6*d.* when &c.; that he shall so levy and extent, and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution whatsoever." Though passed to restrain excessive charges, and only negative in its language ("no sheriff shall take more, &c."), yet this statute has been held to give an action for such fees as are limited and set down therein; so that in England the question would be, has the sheriff done enough to entitle him to poundage under the 28th Eliz. ch. 4.

The 3rd Geo. I. ch. 15, regulates the sheriff's right to poundage when he levies debts for the crown; and the language of sections 3, 9, 16 & 17, considered in connection with the several cases which have been determined in the Court of Exchequer, will throw light upon this question merely as supplying grounds for reasoning upon analogy.—Parker's Rep. 180; 1 Anstr. 279; 2 Anstr. 358; 3 Anstr. 718; Wightarek, 116. But the statute of Eliz. is superseded, I think in this country by our statute 2 Geo. IV. ch. 1, and the rule of court of Easter, 11 Geo. IV., made under it. The allowances are dissimilar and inconsistent, and the statute 28 Eliz. has therefore no direct influence on this question.

An action lies upon our own statute and rule in the same manner as it would lie in England upon the statute of Eliz.; and the English statute is only so far material, that what has been ruled in England to be sufficient to entitle the sheriff to his poundage under that statute, should govern us in the construction of our own, because the same principle is applicable. The 28th Eliz., we have seen, gives the poundage for *serving* and *executing* any execution, 12*d.* for every 20*s.* that he shall so *levy* or *extend* and deliver in execution, or take the body in execution for. Our statute



2 Geo. IV. ch. 1, sec. 45, says it shall be lawful for this court by order or rule from time to time to declare and determine the fees which may be taken by any sheriff in respect of *any business to be done* in the Court of King's Bench, as well in civil causes as in criminal prosecutions. And the rule of court made in Easter Term 11 Geo. IV. under this authority, in assigning fees to the sheriff "*for services rendered by him*," allows "poundage on execution in lieu of all fees and charges for services and disbursements, except mileage on going to seize, and except disbursements for printed advertisements when required by law—one shilling in the pound on all sums under 50*l.*; over 50*l.*, &c. &c.; schedule of goods taken in execution, 2*s.* 6*d.*; copy to defendant if required, 1*s.* 3*d.*; advertisement of sale of lands in the Gazette, the sum actually disbursed. The case of *Alchin v. Wells*, 5 T. R. 470, has been cited in support of the plaintiffs' claim, but in my opinion it is not sufficient to sustain this action. The sheriff had then levied on defendant's goods, and been in possession of them two days; then the parties compromised, and the sheriff satisfied himself for the poundage before he would quit possession. The sum was only 8*l.* After this the plaintiff ruled the sheriff to return the writ, in order to deprive him of poundage, because he could not return that he had levied the money; the motion was to discharge this rule because the parties had compromised, and the court did discharge it, saying "the sheriff, *who had levied* under the writ, was unquestionably entitled to his poundage." In other words, they would not make him refund—but then he *had levied*. This is an action to recover the poundage which can be claimed only under some statute as a matter *positivi juris*, and the case is not brought within the provision, for nothing is shewn to have been done. In 3 Camp. 375, Lord Ellenborough observes, "the law knows of no promise to pay the sheriff for executing the king's writ—that is, no implied promise—he must shew a service for which a reward is specifically assigned and limited by law."

The evidence in this case proves no such cause of action



as the declaration states. The sheriff *executed* no writ, precept or process; he levied no money, seized no lands, and bestowed no labour; did nothing which is relied on as the grounds of the claim. If the sheriff upon a *ca. sa.* goes to seek the defendant and cannot find him, clearly he has no claim for poundage. If he should seize goods under a *fi. fa.*, which afterwards were not found to belong to the defendant, surely he could recover no poundage; but an ineffectual attempt made to execute process cannot give less claim to the fee than the making no attempt. If poundage in this case could be recovered (and the sum claimed is very large), it might equally be recovered if the sheriff had mislaid the writ, and had therefore done nothing; or if he had been directed not to do anything within an hour of his receiving it. If he had gone to any lands, in order to execute the writ, then he might have advanced a claim for mileage, under our rule; if he had advertised, the rule would have entitled him to be reimbursed the sum paid; but the right to poundage clearly cannot attach without a levy; and I see nothing in reason or authority on which the right to recover can be supported in this case. I am of opinion the plaintiff should be nonsuited.

SHERWOOD, J., of the same opinion.

MACAULAY, J., after recapitulating the statutes relating to this subject, said: it is clear that upon a *fi. fa.* against goods the sheriff must actually seize or levy upon them, as it is often termed—and that previously they are not in the custody of the law, but remain (however bound by the writ) amenable to a subsequent execution more vigilantly enforced; and he must not only seize, but retain possession, in order to guard them against the claims of subsequent process.—Stat. 29 Eliz. ch. 4; 3 Geo. I. ch. 15; 43 Geo. III. ch. 46; Prov. Stat. 1809, ch. 4, sec. 3; do. 1822, ch. 1, sec. 19; Rule, Easter 11 Geo. IV.; Stat. 1803, ch. 1; 5 Geo. II. ch. 7.

By seizure the sheriff acquires a special property in them, so that he may maintain trespass or trover against any one wrongfully taking them away—2 Ld. Ray. 1073; 6 Mod. 280; 1 Sal. 323; and by such seizure the defendant is at



once discharged to the value of the goods taken, and the sheriff rendered responsible to the plaintiff for the same—in other words, the value is said to be levied, it only remaining for the sheriff to convert the goods levied into the money he was commanded to make.—6 Mod. 292 ; 2 Rob. R. 57 ; Cro. Jac. 514 ; 2 Show. 394 ; 1 T. R. 731 ; 16 Ea. 288 ; 2 Saund. 324 ; 2 Chit. T. 203 ; 6 Taunt. 370 ; 2 Mar. 78. An execution once begun may be completed ; and after seizure the sheriff may sell, though after the return day of the writ or out of office ; and it would appear he may do so to the extent of his poundage fees, although a compromise take place, or the plaintiff be paid or satisfied, to prevent a sale. It is clear that upon a seizure of goods under a *fi. fa.* a sheriff has levied, and it is the amount *levied* upon which poundage is allowed by the statute of Eliz. Under an extent, it is the amount extended or delivered in execution ; 3 Anstr. 718 ; Parker, 177-8 ; West. 239 ; 1 Anstr. 279 ; 1 Whitw. 117. In all these cases so far is the defendant discharged that, as between himself and the plaintiff, he may sustain an *audita querela* on the levy, or may plead the levy in bar of any action against him for the amount thereof, grounded on the judgment. Here then is, I think, the true principle of the decision in 5 T. R. When the sheriff has seized goods he becomes entitled to poundage if proceedings be afterwards stayed—in other words, when he has commenced executing a *fi. fa.* which is entire, and has done that which exonerates the defendant and renders himself liable to the plaintiff, so that the defendant could have pleaded the levy against an action on the judgment, then he is entitled to exact poundage, as having levied the debt.

The only difficulty will be in applying this principle to the proceedings on writs against lands. If he has commenced an execution, and done that which acquits the defendant and makes himself responsible, so that the defendant could claim the acquittance by plea or *audita querela*—in other words, if the sheriff has levied the amount, he would become entitled to poundage to the extent of such levy, in the event of future compromises—2 T. R. 44-5 ;



Willis, 250 ; 4 T.R. 411 ; 2 C. & J. 19. Then the enquiry is, what constitutes such a levy—what proceeding towards the sale of lands on an execution amounts to a levy, or discharges the defendant as a seizure of goods does? Is it necessary for the sheriff to make an actual entry upon the lands to accomplish a manual seizure, though he may not be authorised to expel the defendant, for the two-fold purpose of placing the same in the custody of the law and out of the reach of future process, and to exonerate the debtor to the extent of the value ; or in the case of a vacant possession, is he at liberty—and if so, is he bound—to take actual possession and to retain the same until the sale ?

It seems clear that upon a liberate extent, or *fi. fa.*, the sheriff cannot deliver actual possession of lands or leasehold estate extended or sold, unless the debtor or other person in possession be willing to relinquish it ; but that he can only (by his assignment or other act in execution of the writ, according to the nature thereof), impart to the creditor or vendee a right of action in ejectment to obtain the possession. Yet when no obstacle or obstruction is interposed, it would seem that a sheriff may take and deliver actual possession, as justifiably entitled to make entry and transfer the property.—1 Sal. 333 ; Tidd. 1136 ; 1 Vent. 41.

Upon the evidence in the present case it does not appear necessary to determine what amounts to a seizure or levy of lands, or whether it must be actual or may be constructive ; and there is much to be said on both sides of that question. It does not appear in evidence that the sheriff had done anything tantamount to a seizure or levy of the lands ; he made no actual entry and gave no public notice of the coming of the writs, and of their operation as a lien upon the estate of the debtors. Without a formal entry and seizure, I do not think a seizure by construction can be intended, until some other open and notorious proceeding towards the execution of the writ shall be adopted—as perhaps the public advertisement of the lands in the *Gazette* and other papers, pursuant to the statute. And this would necessarily assume that by such a step the writ attached to the lands mentioned, so as to discharge the debtor



for the time being at least, and to enable the sheriff to transfer the estate, with right of ejectment to obtain the possession by his deed of sale, without at any time having seen or entered upon the lands themselves. In the absence of proof that the lands were advertised, or any open act of seizure attempted, I do not think any right to poundage could have accrued—the sheriff had not levied to any amount—the debtor had not been discharged, and he himself had not become responsible. I am not prepared to say an advertisement of sale would produce these results, which it appears to me should combine to entitle a sheriff to poundage upon a compromise before actual sale, upon the principles of the case in 5 T. R. 476.

If we examine the cases touching the disposal of terms for years under writs of *fi. fa.* in England, we constantly find a *seizure* asserted; and through a later execution another creditor might always raise the question, whether any and what steps under a former writ attached a particular lot of land, so as to place it in *custodia legis* and protect it from the overreaching operation of subsequent process—1 B. & A. 230; 4 Taunt. 207; 1 Mar. 541; 3 T. R. 292; 5 More. 79; 2 Show. 85; 16 Ea. 254. A seizure of real real estate is often regarded as constructively made through the medium of a jury empannelled to inquire of the premises, as by inquest of office, &c.—See 4 Dow. P. C. 447.

*Per Cur.*—Nonsuit to be entered.

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#### TURNER V. ALWAY.

Debt on award to pay money, on or before the 1st April. Breach, that the said defendant did not pay on the said 1st day of April in the said award in that behalf mentioned, held good on general demurrer to the declaration. Notice of an award need not be averred.

Debt on award. The submission was by bond, dated 4th October 1834, to three persons. Award to be made in writing under the hand of two referees, ready to be delivered to such of the parties as should desire it within three days after 29th October 1834. Arbitrators on 30th October, made and published their award in writing that defendant should pay to plaintiff 75*l.*, which said sum should be paid



over to plaintiff "*on or before*" the 1st April 1835. The breach stated in the declaration was, that the defendant did not "*on*" the said day in the said award in that behalf mentioned pay to plaintiff the said sum of money in the said award mentioned, nor hath he since paid the same or any part thereof, although thereto requested by plaintiff—to wit, on 1st April last—whereby an action hath accrued. Demurrer, assigning for cause that no notice of the award is averred; but the real objection relied on was, that the breach did not state that the money was not paid *on or before* the 1st April, as the terms of the award were.

The demurrer was argued by *Draper* for plaintiff, and *Sullivan* for defendant.

ROBINSON, C. J.—I think the breach is sufficient, although there are cases that bear apparently against it. When a bond is made payable at a certain day, defendant cannot plead payment before the day, but should plead payment at the day; and this upon the principle that payment before the day is payment at the day. Where the money is payable on or before a certain day, then defendant *may* plead payment before the day, because it is within the condition, and is a strict performance. Connected with this principle, there is a class of cases which has no direct bearing upon the point to be determined here. I allude to those where to an action on such a bond defendant pleads payment on a day before the last day named in the condition—2 Wils. 173; Cro. Jac. 434. Such plea is held not to be objectionable as an immaterial issue—because if found one way, viz., for defendant, it decides the suit; but if found for plaintiff it is inconclusive, inasmuch as the defendant may have paid on any other day before the last, or on the last day—2 Burr. 944; 2 Bl. Rep. The court have therefore held that the plaintiff, instead of demurring to such plea, should reply that the defendant did not on the day named by him, nor at any time before nor after that day, pay the money.

In *Tryon v. Carter*, Str. 994, on bond payable on or before the 5th December, defendant pleaded payment on 5th December; the replication denied payment on that day,



and a verdict for plaintiff; but a repleader was awarded, because it might be paid before the 5th December, and then the condition is performed. In Burrows, 994, this is said to be an imperfect note; and the same case is much more fully reported in 7 Mod. 231. Waltnough v. Holgate, 3 Lev. 293, is a case of an award to pay money on or before a certain day: defendant pleads no award; plaintiff replies an award, and assigns for breach nonpayment at the day; defendant demurs generally, because he did not negative payment before the day; and the court give judgment for the demurrer—for the plaintiff, they say, should make out his case without the aid of defendant's implied admission. These decisions apparently favor the defendant in this case; but, in the first place, I take them not to be decisive of the question as it stands before us—and in the next place, the very point in judgment has been solemnly decided in favor of the sufficiency of such a manner of assigning the breach. When defendant pleads payment on a certain day before the day, and the plaintiff replies that he did not pay *on that day*, then he attempts to make the day parcel of the issue, and such a replication would, I conceive, be held bad—for it is incumbent upon him when the defendant pleads *performance*, to assign an *absolute* breach; and by offering to take issue upon the payment pleaded on a particular day, he does not effectually deny performance, nor assign an absolute breach, because defendant may have paid on the last day, or at any time before, and such payment would acquit him. When however the plaintiff, in his declaration on such a bond, or in his replication, first assigns a breach (not by way of answering defendant's plea of performance), then, in my opinion, to aver nonpayment at the day is well enough, for it includes nonpayment before the day. Payment before the day, is payment at the day.—3 T. R. 603.

Since the statute 4 & 5 Anne, ch. 16, it has been decided that in regard to bonds with conditions the day of payment is only form, and the question is whether it was made before original sued.—Co. Lit. 212 b; 8 Mod. 346; Str. 622, 231; Lord Ray. 620; 1 Salk. 140; 2 Mod. 183; Willes, 585; Cro. Eliz. 142; 12 Mod. 422.



In this action on the award, I take it to be clear that payment at any time before the day would have supported the defendant upon the issue of non-payment at the day.

And in the following case it has been expressly decided by the twelve judges in the Exchequer Chamber in Error, that a declaration precisely like the present is sufficient.—Rolle's Abridgment, 440, line 30; Hil. 16 Jac. at Sergeant's Inn, between Berry and Perrin, on writ of error, where the award was to pay at or before such a day, and the breach assigned was for non-payment at the day, without averring the non-payment before, and yet the judgment was affirmed by the court for this reason—that payment before is payment at the day. Mich's. 21 Car. B. R., between Ireland and Sutton, adjudged accordingly on demurrer. Same case, reported in Bridgman 90, under names of Perrin v. Audrey—"the breach is assigned, for that defendant did not pay the 10*l.* upon the 16th day of June, when the award was that it should be paid on or before the 16th of June; but all did agree that this was well assigned, because that when it is alleged that it was not paid upon the 16th day, it was not paid before the day—said to be assigned in replication in Exchequer Chamber. Bulstrode, 3 vol. 69, same case (Coke & Dodderidge, judges): "it hath been objected that he ought to have alleged a breach of the award, or no cause of action. The award was to pay the money at or before such a day; the other saith that he did not pay it '*supra*'—yet this is good, for if he did not pay it before the day he did not pay it *super diem*—so that the pleading is good, and judgment for plaintiff."

SHERWOOD, J.—I incline to think the breach in the declaration may be sustained as it now stands. It is clear, however, from a number of cases, that such a breach would not be good in a replication to a plea of performance on a certain day; and one ground of the distinction I take to be this, that the defendant to such a replication would not rejoin that he paid the money on any other day, because it would be a departure from his plea. Under such circumstances it becomes necessary for the plaintiff to negative



every possibility of payment in his replication, which must be certain in every particular. This rule as to replications to pleas of performance, was laid down by Lord Hardwicke, and expressly recognised in the case of *Fletcher v. Henning*, 2 Bur. 944, in these words: "that whenever the defendant pleads performance, the plaintiff must assign an absolute breach." That was an action of debt on bond, conditioned for the payment of money on or before such a day. The defendant prayed oyer of the condition, and pleaded payment before the day specified in the condition. The plaintiff demurred to this plea, as offering an immaterial issue. The court said the plea was good, and also said, if the plaintiff disputed the payment altogether he should reply "that it was not paid at the particular day mentioned in the plea, nor at any time before or after that day." This is the form of breach prescribed by the court in that case, and is what Lord Hardwicke calls an absolute breach, which amounts to this, that it must remove every possible objection, as the defendant can reply no new matter after the breach is assigned in the replication. The cases of *Watnough v. Holgate*, 3 Lev. 293; and *Tryon v. Carter*, Str. 994, go also to prove the absolute certainty required in the replication to a plea of performance, when no specific breach is assigned in the declaration. The latter action was brought on a bond conditioned for payment of money on or before the 5th December; the defendant pleaded payment on the 5th December; the plaintiff replied, and took issue, and there was a verdict for him, which was afterwards set aside and a replader ordered, because the issue was an immaterial one. The court said the money might have been paid before the 5th December, and then the condition would have been performed. The replication was therefore defective. The plaintiff should have replied as in the case of *Fletcher v. Herrington*, already mentioned, that the money was not paid on the day stated in the plea, nor at any time before or after that day. The award in this directs that the defendant should pay to the plaintiff a certain sum on or before the first day of April—and the plaintiff in his declaration assigns for breach of the award, that



he did not pay on the first day of April. The defendant objects that this breach is not sufficiently certain, because he might have paid before the first day of April, and then the award would have been performed. All the cases cited to sustain this position arose upon objections to replications, and not to declarations—and therefore, according to my opinion, are not applicable to this case. The same certainty is not required in assigning a breach in a declaration as in a replication to a plea of performance, as appears by the case already cited, and *Harron v. Chevalon*, and *Alebury v. Woolley*.—2 Bur. 944; 1 Salk. 140; Str. 231.

The last case was covenant to pay money to several, or to one of them. The breach assigned in the declaration was, that the money was not paid to them, without saying “or to any one of them.” The defendant objected that the breach was not well assigned, for the money might have been paid to one of them, and then the covenant would have been performed. He further objected that there being two ways of paying the money, the breach should have been so large as to exclude both ways, by either of which the act might have been done by the defendant. The court said, “if you have paid the money to one of them, you may plead it in your discharge,” and overruled the objection. The same principle, I think, must govern the present case. The award directs the defendant to pay on or before the first day of April, but he had the right of paying before that day if he found it advantageous to himself. It is clear that he could not be compelled to pay before that day. Now, whether he exercised that right, and paid before the day, must be peculiarly within his own knowledge, because the election was with himself alone. Strictly speaking, the non-payment of the money before the day was no breach of the award; although a payment before the day would have been a performance of it, by the express terms of the instrument. The general rule of pleading is this, that it is not necessary to state such particular facts in the declaration as lie more properly in the knowledge of the defendant himself, who must be presumed cognizant of his own acts. It is sufficient that the declaration should contain in itself a



good *prima facie* case, without reference to possible objections which may afterwards be urged—1 Vent. 217; 8 T. R. 459; 8 Ea. 85; 13 Ea. 116; 14 Ea. 299. The same general rule applies to replications as well as declarations; but there is no general rule without some exceptions, and I think I have shewn that where the plaintiff pleads performance when no specific breaches are assigned in the declaration, the replication must sometimes form an exception. It is also a general rule that certainty to a common intent is sufficient in a plea in bar; but there must be certainty to a certain intent in general in a declaration, which is a greater degree of certainty than the former. To this general rule there are also exceptions. In a declaration on a contract to pay the debt of a third person, it is not necessary to shew that the promise was in writing; but in a plea that fact should be shewn.—1 Saund. 276, n. 2; T. Ray. 452.

In the case of Tryon v. Carter, already mentioned, the action was brought on a bond conditioned for the payment of money on or before the 5th December. The defendant pleaded payment on the 5th December, the day on which it was his duty to pay the money. The plaintiff replied, and denied payment on that day. The court held the replication ill, but do not say how he should have replied, as was done in Fletcher v. Herrington.

The cases of Foreland v. Marygold, 1 Salk. 72, and Perry v. Nicholson, Burr. 278, in addition to the cases already cited, prove that where debt is brought on an award less certainty is required in the declaration than is required in the replication when the action is brought on a bond conditioned for the performance of an award, the breach of which is set out in the declaration.

In the case now before the court the action of debt is brought on the award; and if the defendant has paid the money awarded, he might plead *nil debet*, which would put in issue the whole declaration, and the defendant might shew in evidence any payment made by him.—Cro. Eliz. 222; Gilb. Ev. 242.

Should the defendant plead specially *solvit ad diem*, and conclude to the country, which he might also do, I think



the issue would be good and not immaterial, because he might prove payment before the day mentioned in the award for the payment of the money, and consequently could sustain no possible injury unless from his own laches or negligence in such pleading, according to the exigency of the case.

The defendant was not bound to pay the money before the day, and therefore the plaintiff was not bound to assign the non-payment before the day as a breach of the award ; but the defendant had the right of paying before the day—and if he did do so, he might have pleaded it. This position appears to me to be sustained in principle by the case of *Aleberry v. Woolley*, Str. 231, and the other case already mentioned.

In all cases where the breach is assigned in the replication, and not in the declaration, I incline to think the same rule holds, although there may possibly be some exceptions.

MACAULAY, J.—When a debt is payable *on or before* a certain day, it may be tendered or paid at any time within the period limited ; such tender would be a good plea in bar, and the payment if accepted would thenceforth absolutely discharge the debt and the securities held for the same. When the debt is made payable only at a day certain by the condition of a penal bond, many cases represent that a payment (which includes an acceptance) before the day, at once constitutes a performance of the condition and discharges the bond—thus admitting no difference as to the effect of a payment between a condition to pay at the day or to pay at or before such day ; although in the one case a tender might be made before the day, but not in the other—1 Ro. Ab. 440, l. 30 ; *Ibid*, 473, l. 30 ; Co. Lit. 312 b. ; 3 T. R. 60 ; 8 Mod. 147 ; 10 Mod. 147. Other cases say that when a day certain is fixed, payment before the day contains payment at the day : others say that it is as a deposit till the day, when it becomes absolute payment, and is evidence of such payment in support of a plea of *solvit ad diem*, or a plea of accord and satisfaction before breach—2 Str. 954 ; 7 Mod. 231 ; Cro. Eliz. 142 ; Cro. Car. 284 ; Moo. 267 ; 1 Leon. 311 ; Owen, 45 ; 5 Rep. 117 ; 1 And. 198.



Many cases assert that payment before the day cannot be pleaded to a condition to pay at a day certain—not on the ground that such payment was no present performance of the condition or discharge of the obligation, but that it tendered an immaterial issue, and bad on error if found for the plaintiff, however sufficient if found for the defendant—Cro. Jac. 435; Bull, N. P. 174; 1 Str. 307, 622; 2 Wils. 150; Willes, 585; 8 Mod, 345; Cro. El. 823. Yet other and later cases hold that payment before the day is a good plea when the condition is in the disjunctive to pay on or before; and upon principle the same rule should apply to those appointing a specific day, if in law the payment by anticipation does discharge the bond—2 Burr. 994; 1 Bl. C. 210; 2 Wils. 173; Bull, N. P. 162. And it may with reason be said that every issue rendering the day material (as payment at the day as well as before) would, upon the footing suggested, be equally inconclusive, as not excluding in the one case the possible inference of payment at the day, though after that alleged, or of payment before the day in the other—7 Mod. 231; 2 Str. 944; 1 Burr, 302.

The statute of 4 & 5 Anne, ch. 16, sec. 12, authorises the plea of payment *post diem*, after breach of the condition and forfeiture of the bond; and its terms would equally warrant the plea of payment before the day, if not admissible before, and whether admissible without its aid ought to depend upon the legal effect of such payment as a present discharge of the debt—5 Co. 43; 1 Str. 317, 622; 10 Mod. 147.

Touching the validity of the present breach, cases may be found perfectly similar both for and against it, and there is room for much argument by analogy from cases bearing upon the point—one of which is, that if payment before the day is payment or evidence of payment at the day, a denial of payment at the day includes in effect a denial of payment before it; but the same argument was used, and though partially adopted, it did not prevail in the case of Tryon v. Carter, 7 Mod. 231, which I conceive to be precisely in point. The case turns upon that branch of pleading which respects the suggestion of breaches; and the true



rule applicable to such cases is, that when the plaintiff suggests a breach (whether in his declaration or replication is in my opinion quite immaterial), he must assign a sufficient one—in other words, he may suggest it in the terms of his contract or condition, provided always that it is comprehensive enough to shew a *prima facie* breach thereof—4 Mod. 33. It must not be too narrow or contain a negative pregnant; it must be certain to a certain extent in general, as if the debt be payable at a day certain, the denial of payment at the day in the terms of the security is *prima facie* sufficient, though it might have been paid before or after; the face of the instrument affords no such alternative, and it is not to be presumed. But when the payment may be before or at a fixed day, then the allegation of non-payment at the day is not in the terms of the contract—it is too narrow and does not exclude an inference that is suggested on the face of the instrument—namely, that though not paid on the day it might have been paid before it; in which event no debt would have subsisted or remained payable at, or that could be paid at the day—being previously cancelled—1 T. R. 101. This I take to be the true principle; and a consideration of the cases in the books bearing more or less on the point, confirms me in the opinion that the present breach is insufficient and bad on general demurrer. I have found no room even to doubt it, unless Tryon v. Carter, and other cases which recognize and support it, be overruled; for by merely taking issue on the breach which is alleged, it is manifest that the defendant could have tied the plaintiff down to an immaterial issue, when this case, after a verdict for plaintiff, and the one last mentioned would have been identical—the day would have been made material and put in issue; whereas the distinction is this: if the day of payment be made material and part of the issue, and it is found for the plaintiff, it is an immaterial issue, though conclusive when found for the defendant; but when the day is not involved, but the issue is payment or no payment at any time, then it is all right, and it is equally conclusive upon both parties in any event. I might go into a long train of reasoning upon the cases and just principles to be extracted from them, but it appears to



me this case is clear upon a contemplation of the breach contrasted with the alternative terms of the award. Does the plaintiff's negative of payment on the day in the said award in that behalf mentioned sufficiently shew that the money was not paid before the 1st April, which would have been equally a performance of the award—in other words, does it deny a payment at any time before or at the day. I think it manifestly does not; it limits the default to a single day—whereas, to constitute a breach a default should be also shewn upon every day between the 30th October and the 1st April.

In 1 Str. 231, the judgment by default admitted non-payment to all of those entitled to it—and in law, payment to one would have been payment to all—consequently the breach as admitted of non-payment to them, admitted non-payment to any. The case is substantially different to this; and had the defendant pleaded payment to one, as suggested by the court, it would have formed an immaterial issue if found for the plaintiff on issue joined, as non-payment to one would not shew non-payment to any, and payment to any would be payment to all. With this case may be contrasted others equally applicable. As a submission to an award to be made by *two* or *either* of them; cases of breaches assigned in suits by or against partners, joint contractors, executors, *baron* and *feme*, &c. in the lifetime of all or after the death of some of them, and the like.—2 Mod. 27; Taylor, (U. C.) 20.

It is no sufficient answer that the defendant might plead or give in evidence a payment *ante diem*. The plaintiff was bound to deny it in his breach. At present the demurrer admits non-payment on the day; as in Tryon v. Carter, the verdict found non-payment at the day; in that case it was held in error that non-payment before could not be presumed—and if that be good authority, it cannot be so held here on demurrer. That case has not been overruled, but it has been since recognized, and upon this point it is founded upon principle. I regard the two as similar, and deem the weight of argument against the validity of the plaintiff's breach.

*Per Cur.* (*diss.* Macaulay, J.)—Judgment for plaintiff.



## DOE EX DEM. CASE V. MAGILL.

When a witness, a surveyor, founded his evidence upon the assumption of a certain monument as the correct point to start from in running a line, and the jury gave their verdict accordingly, and such witness afterwards discovered he was in error as to the correctness of that boundary, and made affidavit of his mistake, the court granted a new trial.

This was an ejectment for premises in the town of Hamilton. At the trial the question turned upon the correctness of a line run as the division between the lots occupied by the lessor of the plaintiff and the defendant; and a surveyor who was called gave distinct and precise evidence in favor of the line contended for on the part of the plaintiff, founding his testimony on an assumption that a particular monument, which he took as his place of departure, stood on the same spot as the post which the witness had placed on originally surveying and laying out these lots, which would have the effect of cutting off a narrow strip of defendant's house. The jury gave their verdict in accordance with this testimony for the plaintiff, although there was evidence offered to the contrary. After the trial the surveyor made a fresh examination, and found that the monument had been placed eighteen inches to the westward of where he had planted the original post, and that he had consequently given an erroneous testimony; and an affidavit to that effect was laid before the court by *O'Reilly* for defendant, on a motion for a new trial.

*Draper* shewed cause.

The court, under the circumstances, and considering that the error the surveyor acknowledged he had made would disturb the possession of a number of proprietors, made the

Rule absolute on payment of costs.

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WILSON V. HILL.

Debt on bond; defence, usury—and verdict for plaintiff. In an action of ejectment on a mortgage given to secure the same debt, the jury found for defendant on the same evidence. The court refused to set aside the verdict on the bond, though the judge who tried the cause thought the evidence strong to establish usury.

This was an action on a bond to pay a sum of money, which was also secured by a mortgage. The defence of



usury was set up ; and upon the facts proved at the trial, it appeared to the Chief Justice, who tried the cause at the last assizes for the District of Prince Edward, that the evidence was strong to establish the fact of usury, but the jury found for the plaintiff. Afterwards, at the same assizes, an action of ejectment was tried for recovering possession on the mortgage. The defendant resisted this action also upon the ground of usury, and adduced the same evidence in effect as in the action on the bond. The jury in the latter case found for the defendant.

In Michaelmas Term last *Dougall* moved to set aside this affidavit, as being against evidence. *Grant* shewed cause.

*Per Curiam*.—The facts were fairly submitted to the jury, with a direction favorable to the defendant ; but nevertheless the jury were not convinced of the usury, and acquitted the plaintiff, giving him the benefit of his security. There was no misdirection of which the defendant can complain ; and unless the facts were such as established a case of usury clearly and beyond question, we ought not to grant a new trial. Imputing usury, is imputing a crime ; and when the party charged has been acquitted after a full investigation, the evidence against him should be conclusive before we could properly subject him to answer the charge a second time.

There is certainly an inconsistency between the two verdicts, for the bond and mortgage were given upon the same transaction ; but we are not to come of course to the conclusion that the verdict in the ejectment was right, and this verdict wrong.

*Per Cur.*—Rule discharged.

#### DAY V. SPAFFORD.

Debt on bond—the condition wanted the formal conclusion, “ then this obligation to be void, &c.”. Defendant, after oyer, pleaded the non-performance of a condition precedent by plaintiff. *Held*, such plea was a good bar to the action, notwithstanding the omission in concluding the condition.

Debt on bond. On oyer the condition appeared to be, that “ if defendant shall well and truly convey to plaintiff



a certain lot of land, or if plaintiff shall make default in the payment of a certain sum of money at stated periods," (being the consideration for the land,) and there the condition stops—the usual conclusion "then this obligation shall be void," appearing to have been accidentally omitted. The defendant pleaded that the plaintiff did not pay the sums of money mentioned in the condition—assuming that such breach of the condition made the bond void—according to the evident intent, though not so expressed.

To this the plaintiff demurred generally.

The court determined, on the authority of 1 Ld. Ray. 38, and 2 Saund. 78, that the plea was a good bar, and gave  
Judgment for defendant.

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#### WALKER, ADMINISTRATOR, v. COVERT.

Plaintiff in his declaration described himself administrator, &c., and laid causes of action accruing to him, administrator as aforesaid. Defendant pleaded *ne unques* administrator. *Held* bad on general demurrer. N.B.—There was no profert of letters of administration.

The plaintiff described himself in the beginning of his declaration "administrator of J. W. B.," and in the several counts stated that the defendant was indebted to him, "administrator as aforesaid," but did not make profert of any letters of administration, nor say in any count that the defendant was indebted to him *as* or in the character of administrator. The defendant pleaded *ne unques* administrator, to which the plaintiff demurred generally.

*Per Curiam.*—The plaintiff is clearly entitled to judgment, on the authority of *Henshall v. Roberts*, 5 Ea. 150. He states no cause of action in his representative character, but uses the term only as descriptive, and makes no profert of letters of administration. He might on this declaration recover on a cause of action in his own right, and therefore it can be no bar to deny that he is administrator.

Judgment for plaintiff.

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## DOYLE V. FRASER.

It is not a sufficient ground for setting aside a verdict that the case was tried out of its order, and in the absence of the defendant's attorney and counsel, unless it be further shewn that the defendant had some defence, which it is proper he should have an opportunity of urging.

This was an application to the court to set aside the verdict rendered at the last assizes for the Home District, upon the ground that the case was called on out of its order, and that the defendant's attorney and counsel being absent and taken by surprise, the defendant had no opportunity of making a defence. At a late day during the assizes, but while many causes remained to be tried, and while this case stood in a place on the docket which would not entitle it to be called on for some days, the plaintiff's counsel requested of the court to be allowed, with the assent of the gentlemen of the bar then present, to bring it on, alleging that it was a plain action upon a note of hand, in which the general issue had been pleaded merely for delay; that there could be no defence, as the debt had been acknowledged by the defendant to the plaintiff's attorney, and there was a witness attending from the district of London to prove the handwriting of the defendant, who was detained for no other cause. The defendant's counsel was not in court, and the Chief Justice allowed the case to be called on, observing to the plaintiff's counsel that he must remember that the verdict taken in that manner, for the reason given, would be certainly set aside afterwards, if it should appear that the defendant had in reality a defence which he intended to urge—in other words, that as the defendant's counsel or attorney had no reason to suppose when he left the court that the cause would be called on in his absence, if it should appear hereafter that any injustice could follow from the surprise, the court would not suffer the verdict to stand. A verdict was taken for 36*l.* 8*s.*, the amount of the note and interest. It was an ordinary note, made by defendant, payable to plaintiff at the Montreal Bank. Presentment at the place of payment was averred in the declaration; the handwriting of the defendant was proved; and to supersede the necessity of



proving the presentment at the bank, the plaintiff gave in evidence a letter of the defendant addressed to the plaintiff's attorney, and dated two months after this note was due, in which he writes that he will try and have the note settled as soon as possible. This was accepted by the Chief Justice as sufficient to dispense with proof of presentment, and although the note was not stated specifically in the letter, neither the date nor sum being mentioned, the Chief Justice told the jury they might assume it to be the same, and the plaintiff on this evidence recovered. The verdict being under 40*l.* a certificate was applied for and was granted, the note being dated at Montreal, the plaintiff's residence, and the agent of the plaintiff, who directed the action, was sworn to be an inhabitant of this city; the defendant resided in the district of London.

ROBINSON, C. J.—Upon considering what appears to be the practice in England, and referring to the cases of *Blackhurst v. Bulwer*, 5 B. & A. 907, and *Greatwood v. Sims*, 1 Chit. C. 169, I do not think the defendant is entitled to have the verdict set aside, merely because the case was taken out of its order—1 D. & R., S. C. That would be to treat the trial as being absolutely irregular; and upon such a principle, unless the defendant's counsel were present and gave his assent, the court could never try a cause out of its order on the list upon any exigency, or for any purpose of convenience however urgent and apparent, and however clear it might be that the case admitted of no possible defence. I think the rule not so rigid in England, and that it may lead to inconvenience, and can serve no purpose of substantial justice to make it so here. To entitle himself to relief, the defendant must shew, I think, that injustice would be done him by allowing the verdict to stand; or at least he must lay some ground for such an apprehension, by stating some probable and admissible defence which he meant to urge. I would not look nicely into his means of establishing his alleged defence, nor would I examine very strictly on this occasion the probable irrelevancy or insufficiency of any which he might declare he intended to advance; but some ground, I think, should be laid for sup-



posing that he might derive an advantage from another trial, beyond the mere delay. I do not yet see any in this case; the demand was a plain one; the debt not large; it was clearly proved, I think; no set-off is alleged, and no probable defence suggested. If the defendant could, upon any good ground, have opposed the certificate for costs, he ought, I think, to be relieved, and for that ground the verdict should be set aside; but I do not see that upon another trial a certificate could properly be refused. The cause of action arose in a foreign country, and neither the plaintiff nor his agent resided in the remote district in which the defendant lived; the amount was barely within the district court jurisdiction—and whether the letter produced was sufficient to dispense with proof of presentment was a question which, though I think admitting no doubt, was yet more safe to be trusted to the higher jurisdiction. On the whole circumstances, I think the certificate proper; and as nothing has been shewn or suggested that could alter the state of things on another trial, I think this rule should be discharged, but not with costs.

*Washburne* for plaintiff; ————— for defendant.

SHERWOOD, J., and MACAULAY, J. agreed.

*Per Cur.*—Rule discharged.

#### POPPELWELL EX DEM. CAPREOL V. ABBOTT.

Ejectment as on a vacant possession. It was shewn that there was a house on the premises and some articles of furniture thereon, and that the tenant lived near. The court set aside the proceedings on condition that the applicant, who claimed title as landlord, should appear and defend.

Ejectment as on a vacant possession. The plaintiff, on producing the lease sealed on the premises, obtained the usual rule for judgment, on an affidavit stating the facts of the entry on the premises—lease, and ouster; and further, that at the times when the said Capreol entered the land aforesaid, and executed a lease thereof to the said Popplewell—and when the said Popplewell entered into the same, and was ousted therefrom by the said Richard Abbott as aforesaid; and when the copy of the declaration and notice were delivered, “the said lands were uninhabited and un-



tenanted, and the possession thereof vacant." *Draper*, on behalf of Mrs. Isabella Jones, moved to set aside the rule for judgment on affidavits: first, of one George Taylor, who swears that he was placed as tenant on the premises by Isabella Jones, widow of the late Arthur Jones, in July 1835; and that he has various articles of furniture in the house on the said premises, and that these articles have been on the premises since deponent got possession as tenant as aforesaid: second, of one John Fergusson, who swears that Taylor has been in possession of these premises, and that he has property on the said premises: third, of W. H. Draper, Esq., that the premises for which this action is brought were recently recovered in ejectment on the demise of Arthur Jones, against the same Capreol, lessor of the plaintiff in this cause, and possession taken from Capreol, under the writ of *hab. fac.*; that he has reason to believe that Isabella Jones, widow of the said Arthur Jones, is devisee of the property, to whom or to whose agent the possession was delivered; that he is attorney under seal of Isabella Jones, for protecting her interests under such devise; that she has a good defence on the merits, and is desirous of defending any action brought for the land; and that the costs of the former ejectment are still unpaid: fourth, of Charles Mitchell, that in July last possession was given to him for Isabella Jones, under the writ; that there is a dwelling-house on the land, and two or three acres cleared and fenced round the house, besides land chopped; that after possession was so delivered by the sheriff, Taylor was put in possession of the house and premises, as tenant to Isabella Jones, who is devisee and executrix of Arthur Jones, deceased; that she received part of the crops grown on the premises last season; that some articles of furniture, such as chairs of Taylor, have continually been and still are in the said house, and no person could look into the window without seeing part of them; that Taylor has never abandoned the possession, though he does not perpetually stay on the premises, but has been and still is tenant to Mrs. Jones of the same.

For the plaintiff, affidavits were filed: first, of F. C.



Capreol, that since his ejectment he has gone to the premises a dozen times, early and late, and has seen no one residing there ; that he has seen no sign of habitation on the premises, and has never discovered any tenant ; that the clearing made on the premises was almost all made by him, and that the growing crops were his ; that he has never been asked for the costs of the ejectment ; that he has inquired in the neighbourhood, but has never discovered there was any tenant ; and that Fergusson, who made affidavit on the other side, told him on the 30th January he never heard of any one being there since he left : second, of John Brant, who lives near the house spoken of—says he has never seen it inhabited since Capreol left it ; no smoke from the chimney ; and is convinced it has not been occupied or tenanted ; that Taylor told him he was going to occupy the house, but that it has not been occupied by any person since Capreol left it : third, of Mary Thewing, to the same effect (except as to anything said by Taylor), that she lives near, and the house could not have been occupied without her knowing it. *King* shewed cause.

ROBINSON, C. J.—The law is thus stated in regard to vacant possessions : “ when the premises are vacant, and no tenant is in possession, it is necessary to make a formal entry and seal a lease on the premises.” It is, however, a sufficient keeping of possession of the premises, if any part of the tenant’s property be left by him on the premises—thus, hay left in a barn is a sufficient keeping of the possession : so, when the lessee of a public house took another, and removed his furniture, but left beer in the cellar, it was held a sufficient possession to set aside a judgment obtained by the landlord, as upon a vacant possession.

In cases of vacant possession, the law requires a public entry, in order to avoid all fraud and collusion in obtaining the possession. It is a standing rule on the same principle, that no plaintiff shall proceed in ejectment to recover lands against the casual ejector, without notice to the tenant in possession, and permitting him to become defendant if he pleases. If the plaintiff knows where the tenant has removed to, although he has left the premises in question, he



must be served with notice personally, for notice need not be given on the premises—Str. 1064 ; Bull N. P. 97. So, where land is rented upon which there is no dwelling-house, if it is known where the tenant resides, he must be served with notice at that place. In case of a vacant possession, no person claiming title will be let in to defend.—Bull N. P. 95 ; Barnes, 177 ; Com. Dig. Plead. 2 Y. 4.

It seems that in this case there was a house on the land, of which a person had possession given him as tenant, as well as of the land ; that he had furniture in the house, and lived near. Further, there is reason to think that the lessor of the plaintiff, or his attorney, could not but know who the person claiming the property was, and that there could be no difficulty in suing her, if they were not aware of any person holding under her. I think the rule should be made absolute. My brothers are inclined to let the tenant or devisee in to defend, in order that the plaintiff may not be thrown over an assize. The practice seems against this—for no other reason that I am aware of than because an ejectment of this kind does not form that fictitious proceeding which the court will mould as they see fit. Not finding it agreeable to the practice, I should hesitate to alter it—but my brothers think it may be done.

SHERWOOD, J., and MACAULAY, J. thought the weight of evidence was against the inference that it was a vacant possession—or that the lessor of the plaintiff did not know where the tenant or party claiming to be owner in possession lived ; but as there was colour for his proceeding as upon a vacant possession, they thought the court might allow the service of the declaration to stand, with leave to the present applicant to come in and defend, instead of the non-defendant Abbott—thus placing the case upon the footing of an ordinary ejectment. They were willing, therefore, to uphold the service, so as to enable the parties to come to trial at the next ensuing assizes, provided the plaintiff acquiesced in the proposed admission to defend. Should he decline, the rule must become absolute to set aside the proceedings ; but should he assent, and the present applicant decline appearing as a defendant, then the



case should proceed as upon a vacant possession. Any question touching the costs of the former suit must form the subject of an independent motion.

*Per Cur.*—Rule absolute, on condition that the applicant should appear and defend in lieu of the non-defendant; but if plaintiff did not assent to this, then rule absolute.

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### BIGELOW V. SPRAGUE.

Plaintiff declared on a promissory note with common counts; he gave particulars for goods sold and delivered. The defendant disputed the note as a forgery; and at the trial the plaintiff proved the note, and gave evidence to shew it genuine, and the defendant cross-examined to destroy it—and on plaintiff closing his case, moved for and obtained a nonsuit, on the ground that the note was not included in the bill of particulars. A new trial was granted without costs.

Assumpsit: tried at the last assizes for the district of Newcastle, before the Chief Justice. The declaration contained a count upon a promissory note for 75*l.* made by defendant, payable to plaintiff—a count for goods sold and delivered, and the common money counts. Plea: the general issue. The plaintiff was a merchant, and had had transactions with the defendant to a considerable amount; and, some time before this action was brought, on a settlement of accounts between them, a balance of 75*l.* was struck in the plaintiff's books against the defendant. Not long after this settlement the plaintiff presented to the defendant the note declared on in this action, and demanded payment; the defendant refused payment, declaring the note to be a forgery, and denying that he had ever given his note for the balance struck upon the settlement. The plaintiff, in consequence, brought this action, and the defendant demanded particulars; and on a judge's order, the following bill of particulars was given—viz., an account in detail, containing charges for goods sold, for board, rent and cash, amounting in all to

-	-	£106 3 1½.
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Credit allowed on the whole	-	31 3 1½.
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Balance claimed as due	-	£75 0 0
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"The above are the particulars of the plaintiff's demand in this suit."



No mention was made in the particulars of a promissory note ; but at the trial the plaintiff opened his case upon the promissory note only, and stating that its genuineness was disputed, called several witnesses to prove it. The defendant's counsel cross-examined them minutely, and when the plaintiff thought he had sufficiently established the fact of the making of the note, he closed his case. The defendant's counsel then objected, that as the plaintiff had not stated any demand upon a promissory note in the particulars delivered, no evidence of such a demand could be received ; and that, having shewn no other cause of action, he should be nonsuited. The Chief Justice thought the objection should prevail. The plaintiff then offered to go into evidence of the account ; but the Chief Justice thought him precluded by having opened his case and gone to the jury merely upon the note, and a nonsuit was consequently ordered.

In Michaelmas Term, *Bidwell*, for plaintiff, moved to set this nonsuit aside. *Sherwood, H.*, shewed cause.

ROBINSON, C. J.—Having looked into the practice, the Court are of opinion the rule should be made absolute. As to the main question, whether it is incumbent upon a plaintiff to include in his particulars a demand upon a promissory note which has been specially declared on, my brothers, I believe, are of the opinion that it is unnecessary, and that the plaintiff was therefore entitled in this case to give evidence of this note. It is of little consequence, so long as the rule is settled and the practice generally understood ; but my inclination, both on reason and authority, is the other way. The present case strongly shews, I think, the reasonableness and propriety of the defendant being enabled to know explicitly whether the plaintiff really intends to urge a demand upon any note or bill which he may have declared on, in an action brought upon several causes of action. The defendant had disputed the note before it was sued—pronounced it a forgery, and declared he would never pay it. The plaintiff afterwards sues him ; and though it is true he advances his claim on the note, he also inserts counts in his declaration for the goods sold,



money lent, &c., which would enable him to revert to the original cause of action, and to recover without insisting upon the note. He never pretended to any claim beyond or in addition to the note; and as he nevertheless had declared for goods sold, &c., the defendant had, I think, a right to know from him whether he intended to persist in claiming payment for the note, which had been denied; or whether he meant to abandon it, and resort to his demand for goods sold, &c., as if he had in fact taken no note. A knowledge of the course he intended to pursue was necessary, to enable the defendant to avoid incurring the useless expense of witnesses to disprove the note; and on the other hand, to be prepared to go into evidence respecting the account, if the note was to be abandoned. This struck me at the trial to be reasonable.

In the books of practical forms, and particularly in the most recent, published by Mr. Chitty in 1835 (p. 679), it seems to be assumed, that when particulars are demanded the plaintiff is as much bound to give notice that he intends to claim upon a bill or note declared on, as that he intends to claim upon any other cause of action stated in his declaration. This is the form given for the guidance of the practitioner:—"Particulars of demand in an action on a bill of exchange with the money counts"—"This action is brought to recover the amount of *the bill of exchange mentioned in the first count of the declaration in this cause*, and also for the recovery of the balance due to the plaintiff on the following account," &c.

Nevertheless, it has been ruled at Nisi Prius, by Abbot, C. J., in a case of *Cooper v. Amos*, 2 C. & P. 267, 5 C. & P. 340, that a bill of exchange declared on need not be stated in the particulars; and this decision has been adverted to in the late editions of treatises on evidence, as authority to that effect. On the other hand, the Court of Common Pleas, in the case of *Duncan v. Hill*, 2 B. & B. 682, 5 Moore 567, in a deliberate judgment, assume it to be clear that the bill of particulars in such a case should include the bill of exchange; so that authority as well as reason and common sense dictates, I think, in favor of that side of the question.



It is proper, however, that this nonsuit should be set aside, on several grounds: first, because the plaintiff might well consider himself warranted in omitting the note, by the decision of Abbot, C. J., and the manner in which it appears to be adopted in the late editions of books of practice, and might therefore be allowed a new trial, even if we held it necessary (which a majority of the court does not) to have included the note in his particulars: secondly, I think the defendant's objections came too late at the trial, after he had cross-examined the witnesses called to prove the note—1 Ver. 254. He could not be allowed, I think, to lie by and see what case the plaintiff could prove upon the note, and then object that he could give no evidence respecting it. I think further, that I might have let the plaintiff into proof of his account, if the evidence upon the note was rightly rejected, though that may admit of some doubt.—1 Stark. N. P. C. 72; 4 Esp. 7, 147; 1 Taunt. 353.

*Per Cur.*—Rule absolute for new trial without costs.

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#### SOPER V. MARSH.

In trespass *qu. cl. freg.* defendant pleaded *liberum tenementum*, and on the trial the jury gave 5*l.* damages for plaintiff, against the judge's charge. The verdict being contrary to law, *Held* that the smallness of damages was no reason against a new trial, because the verdict if it stood would be conclusive on the parties as to their rights.

Trespass, *quare clausum fregit*. Pleas: the general issue, and *liberum tenementum*. At the trial, at the last assizes for the district of Newcastle, before the Chief Justice, the case turned wholly upon the title. The defendant made title under Pelatiah Soper, the plaintiff's father, under whom also the plaintiff claimed. On the part of the defendant it was proved, that Pelatiah Soper had conveyed by bargain and sale to one Brown, for a valuable consideration, and Brown had in like manner conveyed to the defendant. On the part of the plaintiff it was proved, by oral testimony, that Pelatiah Soper had once made him a voluntary deed, (before his sale to Brown,) which deed, moreover, was given for the fraudulent purpose of enabling him to vote at an election, upon the understanding that it was



afterwards to be surrendered and cancelled, which in fact was done.

ROBINSON, C. J., directed the jury to find for the defendant, considering that in the first place the deed from Pelatiah Soper to the plaintiff was not sufficiently proved; and in the next place, that such a deed would be void as against a subsequent *bona fide* purchaser. The jury found for the plaintiff, with 5*l.* damages.

In Michaelmas Term, ——— for defendant moved to set aside the verdict and grant a new trial, on the ground that the verdict was against law and evidence, and the judge's charge. ——— shewed cause.

And now the court made the rule absolute, notwithstanding the smallness of the verdict, and though the charge was not complained of. They considered the verdict to be against law; and as the close was specifically described in the declaration by metes and bounds, and issues joined thereon upon the plea of *liberum tenementum*, they apprehended that the verdict, if allowed to stand, would be conclusive as to the right, wherefore they thought it proper to grant relief.—Gilb. Eq. Ca. 235; 2 H. B. 264; 14 Ea. 423; 2 B. & C. 367; 1 Mad. Ch. 307; 6 Ves. 747; Cowp. 250; 3 Mer. 270; 12 Ves. 45.

*Per Cur.*—Rule absolute.

#### HUFF V. McLEAN & HOPKINS.

When there were two defendants, one of whom appeared by attorney and the other did not appear, but the declaration and other papers for both defendants were served on the attorney for the one, the court held the proceedings irregular.

Trespass. Damages were assessed against both defendants at the last assizes for Prince Edward. On the part of one of them (McLean) a motion was made last term to set aside the interlocutory judgment and assessment of damages for irregularity, on the ground that although an attorney had been employed by the other defendant to appear for him and defendant, he (McLean) had never instructed him; and the attorney had in fact entered appearance for Hopkins only, notwithstanding which the declaration and all subsequent papers had been served on the



attorney, as if he had been attorney for both, and nothing had been served on McLean.

*Per Cur.*—There is nothing to support the proceedings against McLean, and the rule must be made absolute, unless the plaintiff should choose to enter a *nolle prosequi* against him.

*Per Cur.*—Rule absolute with costs.

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IN RE STUART, ONE, &C., ON THE COMPLAINT OF BUSTEED.

The court will not proceed summarily against an attorney on a charge of malpractice, where the conduct of the attorney is merely inadvertent and the complainant has his remedy by action.

This was a motion calling upon Mr. Stuart, one of the attorneys of this court, to answer the charges of the complainant, who swore that he was arrested in the London District and also in the Home District in the same suit, and was obliged to find bail in both places; that Mr. Stuart had persuaded his (complainant's) bail to deal harshly with him, and had otherwise acted injuriously and maliciously towards him. This was met by affidavit of Mr. Stuart, who admitted the double arrest, and that a writ endorsed to take bail for 100*l.* and upwards had issued to the sheriff of both districts; that the defendant was arrested and gave bail to the sheriff of the London District; and that the sheriff of the Home District was not directed not to act upon the writ in his hands, in consequence of which the complainant was afterwards arrested thereon, but was relieved as soon as Mr. Stuart became aware of it; that he had inadvertently omitted to withdraw it; that he tendered 5*l.* to complainant as a compensation, which was refused; and that both Mr. Stuart and his client are prosecuted for the double arrest. The bail for complainant also made affidavit repelling the imputation of malpractice as respected them. The court considered the complaint fully met, except as to the irregularity in the double arrest, for which the attorney was responsible; but that no case was made out calling for summary interference.

*Per Cur.*—Rule discharged.



## IN RE ESTATE OF DAVID STEGMAN.

Leave to sue on a bond given to the Lieutenant Governor for the time being, as judge of the Court of Probate, should be applied for to that court—not to this.

*Washburn* moved for leave to sue in the name of Sir J. Colborne, late lieutenant governor, upon a bond given to him as judge of the Court of Probate, on granting administration to the estate of David Stegman, applying on behalf of the next of kin.

The court said that the application for leave to sue upon the bond must be addressed to the Court of Probate. If the complaint of the next of kin was that the administrator did not make distribution of the intestate's effects, a decree must first be obtained requiring distribution to be made—and then, upon the administrator failing to comply with the decree, the bond would be declared forfeited by the Court of Probate, and authority would be given to sue in the name of the lieutenant-governor for the time being.—*Amb.* 183 ; 2 *Ves.* 8 a., 368 ; 3 *Alk.* 348 ; *Comp.* 141. It was supposed that the court would make provision for securing the obligee against costs.

*Per Cur.*—Application refused.

## WHETHEN &amp; HUFF V. A. CAVERLEY.

Plaintiff cannot elect to take a nonsuit after a verdict is rendered for defendant, but before it is recorded. A new trial will be granted when the case appears very doubtful on the evidence, and the party against whom the verdict is given would be concluded by it.

In this case the jury, at the last assizes for the Midland district, gave their verdict for the defendant. After the foreman had mentioned the verdict, but before it had been recorded, plaintiff requested to be nonsuited, which was allowed ; and in Michaelmas Term last, on the motion of the defendant, this nonsuit was set aside, and a verdict for defendant entered, with leave to the plaintiff to move for a new trial, if he was so advised ; and a rule nisi was obtained in the same term.

The action was on a bond from defendant to plaintiffs, for 150*l.*, dated 10th Dec. 1827, conditioned to convey lands ;



“if not paid for by 1st January 1830—then the obligation to be void—said deed to be given when land paid for.” The price was not mentioned in the bond. Two notes of hand for 25*l.* each, one payable two months, the other one year after date, from plaintiffs to defendant, were produced, the plaintiffs’ names being torn off them, and the notes being brought forward by them. The price of the land was stated to be 87*l.* 10*s.* Evidence was offered to shew that James Caverley, a brother of the defendant, had given his note for 62*l.* 10*s.* to defendant, on account of the plaintiffs, and as a collateral security for this purchase money, though not at their request; and that this note had been paid by James Caverley. All these three notes were payable in waggons at 6*l.* 5*s.* each. It was denied that this sum had been so settled on account of plaintiffs.

The court, on consideration of the whole evidence, thought the case very doubtful; and in order that the matter might be more fully investigated, they made the

Rule absolute on payment of costs.

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#### McMARTIN v. McKINNON.

Defendant was arrested and gave common bail—who, to relieve themselves, put in special bail. The attorney for the bail gave notice and signed himself “defendant’s attorney,” and all the subsequent papers in the cause were served on him. Judgment was obtained and defendant arrested on a *ca. sa.*, when it was shewn that the defendant had never employed the attorney. The court set aside the whole proceedings.

The defendant was arrested on a *ca. re.* in 1834, and gave bail to the sheriff. He did not put in special bail at the return of the writ—and the bail below, to relieve themselves, employed an attorney, and put in special bail. This attorney gave notice of bail, and signed it “defendant’s attorney.” The declaration was served on his agent, and the general issue was pleaded. At the trial the execution of the note of hand on which the action was brought, was admitted by this agent. Verdict rendered for plaintiff; and in Michaelmas Term last judgment was entered, and a *ca. sa.* issued, returnable the first of Hilary Term—on which defendant was arrested. *Spragge*, for defendant, moved to set aside all the proceedings, on an affidavit that the defen-



dant had never employed an attorney to put in bail, and had never authorised any attorney to act for him, and that no paper whatever in the progress of the cause had been served on him, and he supposed the plaintiff had abandoned his suit; and the attorney swore he was employed by the bail only, and had received no instructions from the defendant.

*Draper* shewed cause.

The Court held the whole proceedings irregular and defective—as the defendant had never had any opportunity of defending himself, and they made the

Rule absolute, with costs.

*Draper* then applied to have a condition annexed that no action should be brought against the plaintiff, which the Court refused.

#### BILLINGS ET AL. V. REID.

Notice of trial given in lieu of a notice of assessment, is irregular.

Judgment by default had been signed in this cause, and a notice of trial was by mistake served instead of a notice of assessment. No defence was set up at the assizes, and the plaintiffs obtained a verdict; and this irregularity being moved against in the beginning of Michaelmas Term, the court held the objection fatal, and made the rule for setting aside the assessment absolute.

#### HONSBURGH V. FRITZ.

In dower, the summons, if served on the tenant, need not be served on the premises.

Dower. *Campbell*, Q. C., moved to set aside the service of the summons as irregular. It had been personally made on the tenant, but off the land in which dower was claimed.

*Per Curiam*—By the statute 31 Eliz. ch. 3, for avoiding secret outlawries in real actions, it was clearly not intended to make service of the summons upon the *premises* necessary in all cases, but only in those where the tenant could not be found. When the summons can be served personally, no provision such as that statute contains can be necessary, for outlawry is then out of the question; and no



notice can be so good as personal service, though off the premises.

*Per Cur.*—Rule discharged.

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#### REX V. JUSTICES OF BATHURST.

On an appeal to the quarter sessions under the statute 4 Wm. IV. ch. 4, evidence differing from or additional to that produced before the convicting justices may be received and go to the jury.

There had been a summary conviction of one Crosby before two justices of the district of Bathurst under the act for the punishment of petty trespasses; and upon an appeal by the defendant to the quarter sessions the case was tried; and it was shewn to the court upon affidavit, that although upon such trial a verdict of acquittal had been rendered, yet the Court of Quarter Sessions had suspended the entry of any judgment on the verdict, and the justices who made the conviction in the first instance were proceeding to levy the penalty upon the ground that the trial before the quarter sessions had been illegally conducted in this respect—namely, that additional evidence not offered to the justices who convicted had been received at the trial and had led to the defendant's acquittal. Upon this statement of facts, the court last term ordered a mandamus to the quarter sessions to enter judgment on the verdict of acquittal, or to shew cause to the contrary. On the return to the mandamus, the court forbore any further proceeding, because it appeared on the return that no regular verdict of acquittal was in fact brought in by the jury. But the court intimated that a new trial should be had in the quarter sessions, since the last seemed not to have resulted in a verdict. They were of opinion that it was not illegal to receive additional evidence upon the trial before the Quarter Sessions. They admitted it to be the general principle of appeals, that a judgment is to be rendered upon the same facts that were before the inferior tribunal; but they held it to be the intention of the legislature in passing our stat. 4 Wm. IV. ch. 4 (secs. 17, 18), to allow an open trial by a jury, upon such evidence as might be adduced there—which description of appeal, or rather trial by a higher jurisdiction, is not without precedent.



## ROBERTSON ET AL. V. BURK.

An absconding debtor returning to the province after verdict and before judgment, is entitled to a re-hearing, by the granting a new trial.

The court in this case, upon motion of *Sullivan* for defendant, expressed their opinion that in the case of an absconding debtor returning to the province after a verdict obtained against him, and before judgment entered, he was entitled, under the reasonable construction of the statute, to a new trial. The statute allowed him the privilege of a re-hearing, even after judgment, as a matter of right, if he applied within a year; and it followed, that before the judgment was entered, and when consequently the inconvenience to the plaintiff was less, he must be allowed the same right.

*Per Cur.*—Rule absolute.

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## DUGGAN V. DERRICK.

Bail will be allowed on the affidavit of justification taken at the time the bail-piece was acknowledged—although an exception be entered—where nothing is shewn to repel such affidavit, or to impeach their solvency.

A rule for the allowance of bail was moved for in this cause, on notice served that they would justify in open court. Notice of exception had been served, but no ground of exception was now shewn. It was made a question, whether the bail could properly be allowed upon the mere affidavit of justification which had been made before the commissioner when the bail was put in. The court ruled that the allowance might be ordered upon this affidavit, when it was not repelled, and no new matter shewn.

*Per Cur.*—Rule absolute.

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## MALONE V. HANDY.

Rule for the weekly allowance will be granted, on an affidavit that defendant is not worth 5*l.* except his necessary wearing apparel.

The defendant being a debtor in execution, applied for the weekly allowance, upon an affidavit of insolvency, which was in the usual form, except that it added to the declaration of not being worth 5*l.*, the words “except his



necessary wearing apparel." The Court, considering that wearing apparel was expressly exempted from being taken in execution by our statute 11 Geo. IV. ch. 4, thought it was reasonable to hold that the affidavit might be modified so as to give the debtor the benefit of this exemption, and therefore they made the

Rule absolute.

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BABY V. MILNE.

The court refused to interfere in a summary manner to stay proceedings in an action of covenant on a mortgage to secure money—brought for the benefit of an assignee—though it was shewn that the mortgagee had signed a writing not under seal, by which he acknowledged that the instalments mentioned in the mortgage were for a larger sum than was really due.

The defendant being indebted to the plaintiff for the price of a lot of land purchased, gave a mortgage to secure the payment by annual instalments. By mistake, the instalments were expressed to be 25*l.* each, instead of 13*l.* 5*s.* each, as intended. The error arose from an extension of the time of payment beyond that first intended, by which the number of instalments was increased, and the amount of each particular instalment was lessened; in the mortgage, however, the amount of each was left at the sum first agreed to, 25*l.* This being discovered, the mortgagee (plaintiff) gave a writing stating that defendant "was bound only to pay fifty-three dollars per annum for the purchase of lot 12, 6th concession of Yarmouth, in place of 25*l.* as mentioned in the mortgage." This is on a separate piece of paper, signed by plaintiff, not under seal, dated 2nd November 1832.

A motion was made to stay proceedings in this action of covenant on the mortgage, upon payment of the sums really due—not regarding the sum stated in the mortgage as the true debt. No copy of the mortgage was produced. But on its being shewn that the mortgage had been assigned, and that this action was brought for the benefit of the assignee, the Court, as the case stood before them, refused the application.

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## MAY Q. T. V. DETTRICK.

Leave granted to compound an action on the statute Henry VIII. for buying a pretended title, on paying the king's share into court.

This was a *qui tam* action brought upon the statute Henry VIII. against buying or selling pretended titles. The parties had agreed to compound, and upon the court being moved to permit it, a rule was granted, but upon condition that the king's share of the penalty should be first paid into court, subject to which they made a

Rule absolute.

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DOE EX DEM. FRASER V. EAGLESUM.

Where the agent of a client paid an attorney's bill—objecting to some items, but unable without paying it to get papers out of the attorney's hands, the court, considering some charges to be unreasonable, ordered a taxation.

The plaintiff's attorney in this cause had rendered to the agent of his client, who resided in another district, an account for various professional services rendered as well in this suit as in others, and for conveyancing, &c. The agent objected to some of the charges; but as payment was demanded before he could obtain certain papers which had been placed in the attorney's hands, he settled the bill, remonstrating however, and intimating that his client would endeavor to procure relief. This took place some months ago.

This term, a motion was made to order a taxation of the bill; and, upon cause shewn, an order was made on account of one item, which the court thought an excessive charge. It was a charge of two per cent. on the amount of 600*l.* recovered in this action upon the mortgage. It was sworn, and not denied, that the money had never passed through the attorney's hands, and so this charge for receiving and paying over was without foundation.

*Per Cur.*—Rule absolute.

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## HARRINGTON V. O'LONE.

Where notice of trial had been served late—and defendant, immediately on being apprised of it, took steps to procure his witnesses, and arrived with them an hour or two after the cause had been tried, having been detained on the road by bad weather: The court granted a new trial, it being suggested on affidavit that defendant had merits.

This was an action for trover and conversion of a waggon, in which small damages were recovered. *Draper* for defendant moved for a new trial, on the ground of surprise and being precluded by accident from making a defence. The notice of trial had been served late; and when defendant had received intimation by post that the cause was to be tried, he procured his witnesses without delay, and hastened to court, from a remote part of the district in which he resided. He swore that unusually bad weather had detained them some hours on the road, and when they arrived he found the cause had been tried an hour or two before. No witnesses for the defence were called at the trial. The defendant's affidavit, and those of the witnesses he was bringing with him, tended to prove that the waggon of plaintiff had been brought on defendant's premises by a third person, without his privity or procurement; that he had not meddled with it, or refused to give it up, otherwise than by requesting plaintiff to wait till the man who brought it there was present.

The Court granted a new trial on payment of costs.

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BILLINGS ET AL. V. LOUCKS.

Rule for allowance of bail on the affidavit taken before the commissioner refused, where it was shewn on affidavit that one of the bail had, since making such affidavit of justification, absconded.

In this case, notice of satisfaction of bail having been given, the court were moved by *Draper* for rule of allowance upon the affidavit of justification made before a commissioner in October last, when the bail were put in. *Sherwood H.* objected that the bail could not be allowed on this affidavit—and produced affidavits shewing that the bail were not now solvent, and that one of them had lately absconded.



The Court refused to allow the bail, in consequence of this affidavit, but said that if there had been nothing before them to shew any change of circumstances in the bail, or to contradict the original affidavit of justification, the rule for allowance might have issued without any new affidavit.

*Per Cur.*—Rule refused.

### DENHAM V. TALBOT.

A defendant in custody in execution for a sum exceeding 100*l.* is not entitled to be discharged under the statute 5 Wm. IV. ch. 3, unless he has been upwards of twelve months in confinement in the gaol.

Motion to discharge defendant, as a prisoner who has been twelve calendar months in execution in this case for a debt exceeding 100*l.* Notice of this application was served on the plaintiff's attorney thirty days before this application. The defendant was arrested in September 1834, on a *ca. sa.* endorsed for 107*l.*, since which time he has continued a prisoner in execution on this writ. His affidavit complied with the statute, except that he did not swear he had been in close custody for any length of time. The plaintiff swore that he believed the defendant had *not* been in close custody for six months prior to the 1st February last—and it was admitted he had been on the limits, not within the walls of the prison.

*Per Cur.*—It is clear the defendant is not entitled to his discharge, the debt being over 100*l.* The relief is not extended by the statute 5 Wm. IV. ch. 3, sec. 4, unless the debtor has lain in prison.

*Per Cur.*—Rule refused.

### TRUSCOTT ET AL. V. WALSH, HOLLAND AND HUTCHINGS.

It is no excuse for not paying the weekly allowance pursuant to an order, that defendant had it paid at the suit of another plaintiff, or that another co-defendant is not in custody and put in bail after the order granted.

The first two defendants were in custody on mesne process. On the 11th of November last the defendant Walsh obtained an order for his weekly allowance as an insolvent debtor. It was never paid him. And now, in answer to



an application for his discharge, it was urged that Hutchings, the other defendant, is not in custody, and only put in bail last January, after this order; that Walsh has an order for another weekly allowance, at the suit of another plaintiff; and that plaintiffs intend excepting to Hutchings' bail.

The court, however, overruled the objections and made the  
Rule absolute.

### PERKINS v. O'CONNELLY.

An insolvent charged in execution on a judgment for seduction, is entitled to relief under the statute 5 Wm. IV. ch. 3.

*Boulton J.* moved to discharge defendant from custody under execution in this cause for 93*l.*, he having been in prison eleven months and upwards. *Richardson* for plaintiff objected that the statute 5 Wm. IV. ch. 3, did not apply to a case of this description, the judgment being entered on a verdict given in a case for seduction.

*Per Curiam.*—The statute grants the relief to defendants imprisoned in execution upon *any* judgment in a *civil suit*, for *any* debt or *damages*, and this case is clearly comprehended.

Rule absolute.

### PHELPS v. MCKENZIE, Esq., M.P.P.

A member of the House of Assembly has privilege of being sued by summons, and not by writ of *ca. re.*

The defendant is a member of the House of Assembly of the province, and was served with a non-bailable *testatum ca. re.* conformably to the usual practice, under the King's Bench Act, 2 Geo. IV ch. 1. An application was made in term to set aside the writ and subsequent proceedings on the ground that defendant should have been sued in the same manner as members of parliament in England are sued. A rule nisi was granted returnable at chambers; and on the return,

SHERWOOD, J.—I incline to think the statute 12 & 13 Wm. III. ch. 3, and 10 Geo. III. ch. 50, are in force in this



country, and that members of the British parliament coming into this province would possess their privilege from arrest and continue to be subject to the provisions of those statutes; and I also think the members of our provincial legislature must be considered within the principle and reason of those acts, especially as the 6th clause of the provincial act 2 Geo. IV. ch. 1, enables plaintiffs to proceed against them by bill at any time, as directed by 12 and 13 Wm. III. ch. 3, and as practised in the Court of King's Bench in England.

The rule in this case must therefore be made absolute.

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### KING, ONE, &c. V. SUCH.

Where plaintiff, an attorney, brought assumpsit and recovered 3s., the court held him entitled to full costs, as he proved a cause of action to the amount of 20*l.* and upwards, although the jury decided against him on those items of his claim on hearing the whole evidence.

The plaintiff is an attorney of this court, and brought this suit by attachment of privilege. It is an action of assumpsit in the common counts for 50*l.*, in which a verdict was rendered for three shillings only. The cause of action (on which plaintiff failed) was an implied assumpsit on the part of the defendant to pay the plaintiff for inserting advertisements for him—the ordinary charges for which would have exceeded 20*l.* The plaintiff proved he performed the labor at the request of defendant, and so far established a *prima facie* case; but it appeared from one of the plaintiff's witnesses to have been the understanding of the parties before the plaintiff inserted the advertisements in his newspapers that he should not be paid as in ordinary cases, but should receive compensation by being employed as the general printer of an insurance company then in contemplation, in which the defendant was to be a principal actor. The company however was not organized at the time expected, and the plaintiff seeing no other way of being paid but by having recourse to the defendant individually, thought proper to bring this suit, and the jury rejected the claim, allowing only for six newspapers that had been delivered to defendant. Judgment was entered



and full costs taxed, and a *fi. fa.* sued out, upon which the sheriff of the district of Gore levied about 11*l*.

*Draper*, in Hilary Term, obtained a rule nisi to revise the taxation, and reduce the costs to such as by law might be allowed in the Court of Requests, and that the sheriff should return the difference to defendant. *King* shewed cause, and the case was referred to chambers for judgment.

SHERWOOD, J.—It was not denied in the argument of counsel that attornies of this court have the same privilege of suing here as attornies of the Court of King's Bench in England have in suing in that court, except so far as the privilege of the attorney in this province is limited by our provincial statute 3 Wm. IV. ch. 1, which was passed to extend the jurisdiction of the courts of request. The decision of this case must therefore depend on the construction of that act. The 6th clause is in the following terms:—  
“That no barrister, attorney-at-law or solicitor, being served with process of the said court (*i. e.* the Court of Requests), shall be allowed to plead or maintain any privilege against the process, authority, jurisdiction or judgment thereof; nor shall any barrister, attorney-at-law or solicitor, have or maintain any privilege of bringing, in a superior court, an action upon any cause of action which *from its nature shall be properly cognizable in the Court of Requests.*”

I incline to think that no other part of the act bears upon the present question, which appears to me to be this—whether, from the nature of the cause of action, it was cognizable in the Court of Requests. The evidence given at the trial is one criterion, but perhaps not the only one which could be offered, to decide whether any action might properly be instituted in the Court of Requests. In the present case it is the only guide, as no affidavits shewing the nature of the action have been filed, and therefore no such kind of information has been the subject of observation or objection on either side; and I express no opinion whether affidavits will be received or not, although my present impression is in favor of their reception, in addition to the notes of the evidence given at the trial, in any suit. I have seen the notes of the evidence given by the plaintiff



at the trial, and I think the cause ought to have been tried by a jury, and was properly instituted in a court where matters of fact are decided by the country.

The sixth clause of the statute was evidently made to take away the privilege of attornies, &c., of suing in the court in which they are officers, upon a cause of action properly cognizable in the Court of Requests. This section does not direct in what manner the question, as to what court the plaintiff should resort to, must be determined—but, by analogy to the 28th clause, I take it for granted the Court of King's Bench, or a judge in vacation, can decide upon the propriety of bringing the action in this court instead of the Court of Requests, and allowing the plaintiff full costs, when the amount of the verdict shews that the Court of Requests had apparent jurisdiction, as in the present case. The 28th clause of the act, I think, relates to actions which from their nature and amount are clearly cognizable in the Court of Requests; but where from the nature of the evidence which the plaintiff must adduce in support of his case, or from the situation of the witnesses who are absolutely necessary to prove his case, he cannot safely institute the suit in the Court of Requests. For instance, if the cause of action were a foreign bill of exchange, or a foreign promissory note, payable with interest greater than the legal interest in this province; or if the cause of action were a contract made by a minor, or by a person to pay the debt of another, the Court of Requests might not be competent to determine the case. Again, if the witnesses indispensably necessary to prove the plaintiff's case should happen to reside out of the province, or out of the district, although in some part of the province; or if the witnesses were sick or infirm, and wholly unable to attend the trial to give evidence, the action must be brought in a superior court, otherwise justice could not be done between the parties, because no other court has authority to issue a commission for the examination of witnesses.

I think the 6th and 28th clauses of this act are similar in principle to the 1st clause of the statute 58 Geo. III. ch. 4, entitled "An act to regulate costs in certain cases in the



Court of King's Bench"—with two exceptions: the first is, that the judge at *nisi prius* is authorized under the latter act to decide the question as to the amount by granting or refusing a certificate at the trial; but the court or any judge after the trial may decide upon any application made under the Court of Requests Act. The second exception is, that the provisions of 58 Geo. III. do not extend to barristers, attornies and solicitors; and consequently they retain their common law privilege of suing in the court in which they are admitted members of the profession.

Whenever the verdict of a jury is less than 40s. in any action instituted in this court for the recovery of a debt or sum of money alleged to be due to the plaintiff by the defendant, either by express or implied contract, no more costs than are allowed in the Court of Requests should be taxed by the officer of this court, unless full costs are ordered by this court or a judge in vacation on the application of the plaintiff. When the amount of the verdict is under 40s., I think the presumption is that the case is cognizable in the Court of Requests, and throws upon the plaintiff the burden of establishing the fact of its being a case proper to be instituted in this court rather than the Court of Requests.

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During the term, the following gentlemen were called to the bar and sworn in, viz. :—WILLIAM MILLER, WILLIAM HENRY BOULTON, CHARLES DURAND, and J. A. MACDONALD, Esquires,

J. B. ROBINSON, C. J.

L. P. SHERWOOD, J.

J. B. MACAULAY, J.



## KING'S BENCH.

EASTER TERM, 6 WILLIAM IV.

## DOE EX DEM. DOBIE V. VANDERLIP.

Where A. having only a bond for a deed, and not having paid all the purchase money made a conveyance in fee to B. and died, and B. went into possession of the land, and continued in possession for several years, when A.'s administrator obtained a conveyance in fee to himself, from the person who had given A. the bond: *Held* that the administrator, by making use of the deed, was guilty of a fraud, and that his title under it could not prevail against B.

Ejectment for a small piece of land in the township of Grantham. At the trial of this case at Niagara in 1835, it was proved that one Reid had been seized in fee of the premises and had contracted to sell them to one James Dobie, a brother of the lessor of the plaintiff, for 75*l.*, giving him a bond to convey upon the payments being made. Dobie, after concluding this purchase, and while he held only the bond—not having yet paid for the land—sold it to Vanderlip the defendant, and executed a conveyance to him on the 27th September 1817. Defendant has possessed the land since and improved it. Many years after this, James Dobie died intestate, and Matthew, the lessor of the plaintiff, who is not his heir at law, administered to his estate. In January 1835, the lessor of the plaintiff went to Reid and demanded a deed as the representative of his brother's estate, paying him a small balance of 2*l.* 10*s.* which his brother had left unpaid of the 75*l.* The subscribing witnesses to the deed stated that it was called for by the lessor of the plaintiff and given by Reid expressly in fulfilment of the bond given by James Dobie. The former claimed it in his capacity of administrator to his brother, saying that the word "administrators" was in the bond. The bond was alleged to be then in an attorney's office in Niagara and was not produced; but a writing was given by the lessor of plaintiff to Reid, which was proved at the trial, undertaking to deliver up the bond to him and to indemnify him against any liability under it. The bond having been by



some accident lost or mislaid, was not exhibited at the trial. Matthew Dobie having thus obtained a deed to himself of the premises in question, brought this ejectment to dispossess Vanderlip, who had bought from James Dobie and possessed and improved the land since 1817, and had received a conveyance from him which was not valid only because James Dobie had not then fulfilled his contract and obtained a conveyance. The Chief Justice, who tried this cause, directed the jury, if they were satisfied Matthew Dobie acquired his title under the foregoing circumstances, to find for the defendant, reserving to the plaintiff leave to move that a verdict should be rendered in his favor if this court should be of opinion that the facts presented were no legal bar to Matthew Dobie's recovery.

The case was argued by *Richardson* for plaintiff, and *Sullivan* for defendant.

ROBINSON, C. J.—If Matthew Dobie had acquired the title by reason of being heir to his brother, he would have been estopped from denying Vanderlip's title, on the ground that James Dobie was incapable of conveying, his subsequent deed would have enured to confirm Vanderlip's title. Though not the heir, and so not entitled to receive the deed as the legal representative of his brother in this respect, he did nevertheless acquire the title under the pretence of privity; he availed himself of James Dobie's payment; the small sum remaining unpaid he professed to pay to Reid, as the administrator of his brother; and it is to be inferred that he did in fact pay the money from his brother's estate, and not out of his own means; he made no new purchase or bargain. No doubt the word administrator *was* in the bond, but used, we must suppose, merely in the ordinary manner, with reference to the legal remedy in case of James Dobie's death. It is not likely, and was not proved, that the condition was so absurd as to require Reed to convey a title in fee to James Dobie and his administrators. If from ignorance the word "administrators" *had* been used, coupled with proper words of inheritance, the latter only would be regarded as applicable to the subject matter—the other must be rejected as redundant; but there



is no reason to suppose that the bond was drawn otherwise than in the proper form, requiring Reid to convey the land to James Dobie, his heirs and assigns.

When Matthew went to Reid and demanded a title on the footing of administrator, he might have done so ignorantly and with no fraudulent design, but clearly he had no right to the conveyance, which was unfortunately made to him. Having on this pretence received the deed, the fraudulent use which he now endeavours to make of it places him in the same situation as if he had meditated a fraud from the first, since we cannot tell what may have been the motive originally, and it is just to judge of his intentions from his acts. It is my opinion that Matthew Dobie cannot claim as an independent purchaser under this conveyance, and set up his title against the defendant in order to dispossess him as a trespasser.

No doubt a court of equity might consider him only as a trustee holding for the benefit of Vanderlip, if they recognized any title in him under the circumstances; but it does not follow, because a court of equity would in this way prevent injury to Vanderlip, that a court of law must suffer its proceedings to be made the instrument of such palpable injustice, and that there can be no relief but in equity. The lessor of the plaintiff cannot be allowed thus to avail himself of his own wrong; no sale to him was made or intended; no consideration passed from him; there was clearly a privity between him and James Dobie, for he claimed to be his representative for this purpose, and took the deed expressly as a fulfilment of the sale to James Dobie. He is estopped, under these circumstances, from treating Vanderlip, the purchaser holding under his brother, as a trespasser; and in his attempt to do so, he is liable to be met by the same objections as could be opposed to his brother, for he claimed to derive his right through his brother, and undoubtedly acquired his title in consequence of that priority; and it surely cannot be said that he can demand and receive the deed as the representative of his brother, and avail himself of the consideration which his brother had paid, and then place himself as against Van-



derlip in the attitude of an independent purchaser, and hold himself discharged from all estoppels that would lie against the person through whom he claimed, and of whose interest he distinctly availed himself.

SHERWOOD, J., concurred in opinion with the Chief Justice.

MACAULAY, J.—Had Geo. W. Reed a vested estate in possession subsisting in him in January 1835, by virtue of which he could convey the fee simple to any purchaser, notwithstanding the contract of sale with James Dobie in 1817, and the subsequent possession of defendant as a purchaser and assignee under him, as a vendor not having conveyed, he might, I apprehend, at any time within twenty years treat the vendee, in his caprice, in possession as a tenant, and after due notice eject him—although a contract to sell and a right to demand a conveyance might be shewn, on the principle that in a court of law the legal title must prevail. If so, it would seem to follow that, notwithstanding the contract of sale, the possession of the fee still remains vested in him; and if he could sell and convey such fee without first ejecting his original vendee, then I do not see how the present plaintiff's title can in a court of law be impugned. I do not see that if Reid acted *bona fide*, the deed can be impeached for fraud, because the lessor of the plaintiff seeks to pervert its intended use. The deed, if in itself valid *inter partes*, if not fraudulent against Reid, cannot be vacated collaterally in a court of law, unless it were shewn that both parties conspired together to injure or defraud the defendant, when it might be otherwise; and if Reid, desiring to pass the estate to plaintiff, could do so, I do not perceive any relief for defendant except in equity, where I should suppose the plaintiff would be declared a trustee for the defendant, and be decreed to convey to him accordingly. Parol evidence is not admissible to affect or change the application of the deed to the lessor of the plaintiff, and at most would only shew him to be trustee of the defendant in equity. In this case, however, the majority of the court deem the conveyance invalid; and though I cannot at present unite in the judgment given,



I feel no difficulty in assenting to its justness upon the merits, divested of technical difficulties. If Reid had not a sufficient possession to enable him to convey the estate to the lessor of the plaintiff adversely to the interest and rights of the defendant, then of course the present verdict would be sustainable for that reason, although other grounds should be insufficient to warrant it. The statute of 1834, ch. 1, may also be applicable in a consideration of the question how far Reid could convey to a stranger as being reduced to a mere right of entry from lapse of time under defendant's holding. It appears that Reid sold to J. Dobie long before he was himself entitled to a conveyance—and having afterwards, and during defendant's possession, received a title from his vendor, the case resembles that of *Doe ex dem. Wilcox v. Thorn*, recently decided in this court. There, Wilcox had agreed to purchase a lot of land and had received possession, after which the fee simple was conveyed to Benson, who afterwards conveyed to a stranger out of possession, adversely to the legal assignees of Wilcox, without ever having had actual possession under his deed. So here, Reid had sold before his legal title had accrued, and afterwards conveyed to plaintiff without previously re-possessing himself of the property when clothed with the legal title in fee—the difference is, that here Reid is the original vendor, under whom defendant must claim; while there, Benson was not the vendor of Wilcox.

*Per Cur.*—Postea to plaintiff.

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#### ST. LEGER V. MANAHAN.

The plaintiff obtained a lease under the great seal for a lot of land, and finding plaintiff in possession as an intruder, gave him notice of the lease and requested him to leave the lot. Defendant afterwards cut off some valuable timber, for which act plaintiff brought trespass. *Held*, that plaintiff could recover without further proof of entry.

The plaintiff obtained a lease from the government of the land in question; and afterwards found that the defendant had cleared a few acres and had built a small house on it while it was in a state of nature and in the possession



of the crown. The plaintiff requested the defendant to leave the land, and informed him of the lease. Defendant refused to leave the land, and afterwards cut down some valuable timber, for which act the plaintiff brought this action of trespass. The defendant had no license whatever to go upon the land, and therefore was an intruder on the possessions of the Crown at the time the lease passed the great seal. It was not proved that the plaintiff had made formal entry upon the land before this action was brought; and it was objected at the trial that this action could not be sustained without proof of entry in fact. Sherwood, J., who tried the cause, reserved the point, and directed the jury, if they found a verdict for the plaintiff, to give damages only from the time of the request to leave the land, which they accordingly did. And the judgment of the court was this day given on the question whether an entry in fact was necessary to entitle the plaintiff to recover.

ROBINSON, C. J., expressed his opinion that under the circumstances the plaintiff was entitled to the verdict which he had obtained.

SHERWOOD, J.—The general rule of law is, that before actual possession by entry, a person cannot maintain trespass to real property, though he had the freehold in law as a purchaser by lease and release, though the statute executes the use;—or an heir or devisee against an abator or a lessee for years before entry.

In the case of *Clinch v. Hendricks* (Taylor, 355), this court held that the king's grant, under the great seal, gave the grantee a sufficient possession of land to main trespass without actual entry. I see no real difference between this case and that. The defendant being an intruder, had gained no possession from the crown before the lease was made and given to the plaintiff; and after the plaintiff had received the lease, he shewed his acceptance of it by requesting the defendant to leave the land, and by asserting his property in it. The formality of taking possession by openly declaring an intention of doing so, is become in some degree obsolete, as appears by the case of *Butcher v. Butcher* (7 B. & C. 399). I incline to think the lease under the great



seal gave the plaintiff possession of the land, after he shewed his intention to accept it by claiming the land from the defendant ; and being in such possession, I think he could sustain this action as well as if he had entered upon the land, the defendant having no possession recognised by law.

MACAULAY, J.—It appears to me that under a lease for years from the king, under the great seal, as in other leases of a like kind, the lessee until entry has but an *interesse termine*. The entry is the overt act of adoption, which renders the party liable to the rents reserved, and without which there is nothing apparent to evince it. A lessee possessing an *interesse termine* only, cannot maintain trespass *qu. cl. fregit*—a previous entry would be necessary. An intruder upon the crown before a grant would not by continuing to hold be considered a disseizor of the king's grant in fee. The grant is equivalent to livery of seizin ; but livery is not necessary in a lease for years, the lessee being licensed to enter *ad libitum* by the lease—but it does not follow that the king's grantee in fee could maintain trespass *qu. cl. freg.* against an intruder on the crown holding on after the grant, without a previous actual entry. Upon principle, I should think such entry indispensable. I do not find it decided that a mere conveyance can impart a right of action against a person previously in possession, though a continuing trespasser from the time of his entry until such conveyance, as against the party conveying. To confer such right, the conveyance must be equivalent to an actual entry, so as to constitute the holding of the wrongdoer a new and independent trespass against the bargainee. A conveyance that operates without the necessity of livery of seizin, will not do this. Such an instrument gives only a right to enter or maintain ejectment if another be already in possession, but not an action of trespass *qu. cl. freg.*, when a trespass with a *continuando* commenced before the title of the purchaser. The same rule would hold equally whether the right to the estate was acquired by purchase or accrued by operation of law, as by descent, &c. ; and I do not find that in the instance of a lease for years any



difference exists on this head between a term demised by the crown or by a private individual—Cro. Jac. 522, 240, 399; Cro. El. 46, 275; Co. Lit. 231 a., s. 59; Dyer, 285; Jenkins, 227; Pl. 92; 3 Leon. 213; Palmer, 175; Perkins, 603, s. 115-6; Carl. 66; Ba. Ab., Lease M. The only question with me in the present case has been, whether the plaintiff did not enter before action *animo clamandi*; or at least, whether the evidence would not warrant the jury in so finding. This, being a matter of fact, would depend upon the verdict if left to the jury, or the report of the learned judge, if unequivocally proved. In my construction of the notes of evidence, I should infer that there was evidence from which a jury should rather have inferred an entry *animo clamandi*, than the contrary; and consequently, as damages were directed by the court not to extend further back than that period, the result would in this view be right, even on the grounds of my opinion as to the time when a right of action in trespass first accrued to the plaintiff. If otherwise, then of course, under the impressions I entertain, a new trial would be the proper course, in order to ascertain whether the plaintiff did or did not make entry *animo clamandi* before the institution of the suit.

*Per Cur.*—Postea to the plaintiff.

#### DOE EX DEM. McLEAN V. WHITESIDES.

A. mortgaged lands in fee to B., and before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mortgage. No re-conveyance from B. to A. was proved. C. went into possession and continually held, till about 13 years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mortgage. *Held*, that D. was not entitled to recover in ejectment, and that if necessary a re-conveyance from B. to A. might be presumed.

Ejectment for the north half of lot 29 in the second concession Scarborough. At the trial, at the fall assizes for the Home district, the following facts appeared: it was admitted that one Ebenezer Cavers was seized in fee of the premises on the 29th November 1819, and of other land adjoining, 300 acres in all. He had borrowed 125*l.* of one Thomas Kirgan, and had given him his bond for the debt;



the defendant and a brother, James Whitesides, are nephews of Thomas Kirgan, and were invited by him to this country under some promise to provide for them. Kirgan assigned this bond against Cavers to his nephew James Whitesides, who pressed Cavers for payment, or for security on his land. Cavers consented to give a mortgage on the 300 acres (including the 100 acres in question in this action), but declined giving it to Whitesides—preferring that Kirgan, with whom he was acquainted, should hold the security. He did accordingly execute a deed to Kirgan, which is not now in existence. One witness described it as a mortgage—a deed poll. Another witness—who is a subscribing witness to this deed and to the memorial of it (for it is registered)—declares, that either the deed was on the face of it a mortgage, or that if it were an absolute deed, a bond was given to reconvey on payment of 125*l.* in three years. The memorial of this deed was produced, and shewed that the deed was dated 27th November 1819; that it conveyed the land in fee for a consideration of 125*l.*, and nothing is said of any proviso for redemption. Cavers, afterwards, was willing to convey the 100 acres absolutely, on getting up this deed spoken of as a mortgage; and by some arrangement between the two Whitesides and Kirgan, it was agreed that this 100 acres now in question should become the property of Thomas, and not of James. Accordingly, in March 1822, Cavers conveyed to Thomas Whitesides by a deed, which Kirgan witnessed, together with another subscribing witness, who proved it at the trial. And afterwards, Kirgan being apprehensive that this deed was defective on account of the dower of Cavers' wife not being barred, took a new deed from Cavers and wife to Thomas Whitesides, which Kirgan also witnessed.

The deed spoken of as a mortgage was proved to have been given up or destroyed. Some years afterwards a niece of Kirgan, who is married to the lessor of the plaintiff, came out from Ireland to reside in the province, and Kirgan latterly went to live with them. In May 1834 Kirgan, being then upwards of 80 years of age, was induced by some consideration to desire to deprive the defendant of this land,



and to give it to McLean, the lessor of the plaintiff, and he executed a deed to him in fee. Kirgan, not long after, died, and the lessor of the plaintiff now claims under this deed, contending that the deed of 27th November 1819 must be taken from the memorial to have been an absolute deed—that it vested the title in Kirgan, and that Cavers was thereby disabled from conveying afterwards to the defendant. The Chief Justice, who tried the cause, charged the jury that Kirgan being privy to the conveyance from Cavers to the defendant, which was subsequent to the mortgage spoken of, was strong evidence of the fact that the deed was made with his assent, and implied a recognition on his part that Cavers had a right to convey. It was indeed at his instance, and by his procurement, that the deed to defendant was made. If Cavers, instead of conveying on that occasion to Whitesides, had conveyed to Kirgan, and Kirgan had executed a deed to Whitesides, then Kirgan and McLean, as claiming under him, would have been estopped from setting up any title under the mortgage. As the case stood, if the jury were satisfied that the mortgage from Cavers to Kirgan was discharged, then it remained a question whether they might not presume a re-conveyance to Cavers before the absolute deed was taken. About thirteen years had elapsed, and possession had during that time accompanied the defendant's title. The jury found for the defendant.

*Washburn*, in Michaelmas Term last, moved to set aside this verdict and grant a new trial, as being contrary to law. *Baldwin* shewed cause.

ROBINSON, C. J.—I am of opinion that the verdict was clearly proper. The recent bargain and sale to McLean had no pecuniary consideration to support it. There was, it is true, the usual receipt endorsed, and the usual acknowledgment in the body of the deed; but, however conclusive these might be, as between the parties, they do not, as I conceive, prevent third parties from shewing the truth. Next, this deed of bargain and sale was made by Kirgan when he was out of possession of the premises—the defendant being at the time in the actual occupation of the land,



as he had been for many years, under an independent title, and Kirgan moreover never having been actually in possession. Then it was clearly shewn that the deed from Cavers to Kirgan was in fact a mortgage which had been fully satisfied, and, as it seems, before the day limited for redemption. The satisfaction being before forfeiture incurred, no re-conveyance could be necessary; and if the satisfaction had not been received until after the estate had become absolute by forfeiture, then, although a re-conveyance would be necessary in point of form, the jury, in my opinion, were warranted in presuming it, after thirteen years' possession by the mortgagor or his assignee, and would have been warranted in presuming it after a much less lapse of time, since it was clearly the duty of Kirgan to re-convey after he had received satisfaction—4 T. R. 682. Under the circumstances of this case, it is out of the question that a title in ejectment can be set up under this satisfied mortgage; and besides, it is clear that if it were necessary, the court, on a proper application, must stay the proceedings under the statute 7 Geo. II.

SHERWOOD, J., concurred with the Chief Justice.

MACAULAY, J.—The evidence does not shew a sufficient subsisting title in Kirgan to convey to the lessor of the plaintiff. He claimed under a deed poll, unsupported by proof of livery of seizin; he never was in possession; and at the time of the conveyance to plaintiff the defendant was and for a series of years had been in possession, claiming under Cavers in fee. In addition to which, it is to be observed that the deed poll was a mortgage only; that no recognition of the deed is shewn subsequently to the deed to defendant, which is witnessed by the mortgagee, and bears date in March 1822, before the debt secured by such mortgage became due—circumstances, combined with other facts in evidence, affording sufficient ground for the jury to presume the debt paid, cancelled or forgiven, at or before the day, thereby extinguishing the security—or to presume a re-conveyance by reason of a satisfaction of the debt *post diem*, if not paid at the day. As at present advised, I think the verdict for defendant should be sustained. It is



of course open to the lessor of plaintiff to renew the ejectment, if desirous of further litigating the matter.

*Per Cur.*—Rule discharged.

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WALLEN V. MAPES.

In assumpsit for work and labour, when there is a written agreement fixing the price, such agreement must be produced on the trial of the cause, unless it has been rescinded.

Assumpsit. It appeared in evidence that the plaintiff had cleared ten acres of land for the defendant, and the plaintiff's first witness said he had heard read a written agreement on the subject, but no such agreement was produced. It was also proved that the defendant had refused to execute a bond to plaintiff, which the latter had called upon him to sign, as having cleared the land; the defendant saying he had signed too many papers already, and denying that the land had been chopped according to agreement, but that he would accept it—and that he had since cultivated the land. It appeared that the plaintiff and others under him had cleared other land besides the ten acres; and it was stated that six acres of it was so cleared by the plaintiff on his own account, and not at defendant's request, as being land that he was to receive from defendant for clearing the ten acres first mentioned, but it was proved that defendant was in possession of and enjoying the benefit of the whole. The five acres were worth 3*l.* per acre, and two pieces of five and six acres respectively worth 1*l.* 10*s.* per acre. The ten acres bring in all 22*l.* 10*s.*, exclusive of the six acres, 9*l.* A nonsuit was moved for, on the ground that there was a written agreement not produced or accounted for. Macaulay, J., who tried the cause, said he was apprehensive the objection was fatal; that he would not, however, direct a nonsuit, but leave the defendant to apply to the court above. The case was then left to the jury, with instructions to find for plaintiff the value of such land as he cleared at the request of defendant—but not for that which he might have done on his own account, however disappointed and damaged by the defendant's breach of any executory contract in writing not produced. The jury found for plaintiff, 31*l.* 10*s.*



In Michaelmas term last the *Solicitor General*, for the plaintiff, obtained a rule nisi for a new trial, renewing the exception taken at nisi prius.

*Draper* shewed cause.

ROBINSON, C. J.—We think that the defendant is entitled to a new trial, though the nature of the written agreement is very indistinctly brought out in evidence. It does sufficiently appear that the labour for which the plaintiff seeks compensation was performed under a written agreement, which provides specially for the remuneration; and it is not shewn that the plaintiff is entitled to consider the agreement as rescinded or executed.

*Per Curiam*.—Rule absolute without costs.

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#### POTTS V. DOYLE.

When a trial was put off by defendant on payment of costs, and such costs being unpaid plaintiff tried the cause and defendant obtained a verdict—the court refused to set off the costs of putting off the trial against the ultimate costs of the cause, there being no affidavit that the defendant was insolvent.

At a former assizes the trial was put off on application of defendant and on payment of costs. At the last assizes for the Home District the cause was tried, and now a motion was made on behalf of the plaintiff to deduct the costs of putting off the trial, which were still unpaid, from the taxed costs on the entry of defendant's judgment. This was resisted on the ground of the attorney's lien.

ROBINSON, C. J.—The practice of the Common Pleas seems always to have been unfavourable to allowing the lien of the attorney to obstruct an equitable adjustment between the parties, by setting off costs; but in the King's Bench the general principle seems to have been not to allow the attorney in one case to be deprived of his lien by admitting a set off of costs accrued in other causes, but they have commonly refused to suffer an objection, on the ground of the attorney's lien, to prevent the equitable arrangement of all the costs accruing in the same cause. In *Howell et al. v. Harding*, 8 Ea. 362, the court agreed that the attorney's lien only attaches upon the balance of the costs accruing in the same cause, which are ultimately to be paid



over to the one or other party in that cause, and that the cause is not to be split so as to give the attorney of either party a lien upon the interlocutory costs. The case of *Aspinall v. Stamp*, 3 B. & C. 108, does not, I think, expressly controvert this principle, though the decision was in favour of protecting the attorney in his lien, under the peculiar circumstances. There it was shewn that the attorney, if the set off were allowed, would lose his costs, as the client was insolvent, and the payment of costs by defendant to plaintiff had been made a condition precedent to the cause being tried, upon certain terms which were favourable to defendant. By allowing the cause to be tried while these costs were still unpaid ; the plaintiff waived an advantage under which he could have enforced their prompt payment ; but the payment before the trial was so clearly a condition incumbent on defendant, that it was considered hard under such circumstances that the attorney should lose his costs, by their being allowed to be set off against the ultimate costs of the cause taxed for the defendant, who obtained a verdict. The defendant, the court said, must pay them.

In this case the costs of putting off a former trial were demandable, it is true, when the order was not made for putting off the cause, though they remained unpaid ; it was natural, because it was obviously his interest that he should nevertheless take his cause to trial at the following assizes. And the defendant having got a verdict, I do not see upon what principle we can deny the application of the plaintiff to set off the costs which defendant was before ordered to pay him, against the costs of the cause. *Howell v. Harding* is in point. There is no condition precedent in this case. The plaintiff brought on his cause a second time to suit his own convenience, reserving his remedy for these former costs, and defendant had a right to defend of course ; and here is no affidavit of the insolvency of the client. These are mere interlocutory costs.

SHERWOOD, J. and MACAULAY, J., of the same opinion.

See 1 Dow. P. C., 269, that the lien of the attorney will be recognised.

*Per Cur.*—Rule discharged.



## HOLDEN V. MCCARTHY.

A plaintiff who fails on the special counts of his declaration, will not be allowed afterwards to resort to common counts.

Debt on bond—penalty 500*l.*, being a submission bond, with excuse for profert that bond is in defendant's possession. Second count—that whereas differences had arisen between defendant and plaintiff and between defendant, plaintiff and one E. Perry, respecting a bond signed by plaintiff and Perry to defendant, and that *the parties* agreed to refer *the same* to the award of Burnham, Ruttan and such third person as they should choose; and did by these several obligations, dated 28th of June, 1834, become bound each to the other in 500*l.* with condition to obey the award of Burnham and Ruttan, and of any third person to to be chosen by them, to arbitrate of all matters in dispute between the plaintiff and defendant, as well as all matters in dispute between the said parties and the said Perry, respecting the said bond, signed by the said plaintiff and the said Perry, to the said defendant, as by the said arbitrators or any two of them should be awarded, so as said award should be made in writing on or before the 15th<sup>e</sup> of August next ensuing; that Burnham and Ruttan chose D. Brodie, as their arbitrator: that Burnham, Ruttan and Brodie, having heard the parties &c., Burnham and Ruttan, within the time (viz. 11th of August) made and published their award in writing, subscribed with their hands and *sealed with their seals*, bearing date the day and year last aforesaid, and did thereby award that the defendant should pay to plaintiff, on or before the 19th of February then next, 25*l.* 6*s.* 6½*d.*; as by the said award will appear. Averment of notice and non-payment. Common counts also.

Pleas:—1st count, 1st—*non est factum*. 2nd, that the bond was surrendered to be cancelled. 3rd. after oyer and setting it out with condition as in the 2nd count, no award. To the 2nd count, 1st—denies the submission to the award of *Burnham* and *Ruttan*, as in the 2nd count mentioned. 2nd pleads no such award as set out, (*i. e.* under seal), duly made by *Burnham* and



Ruttan, within the time &c. 3rd, no such award made by Burnham and Ruttan. To the common counts—*nil debat*. Replication—1st. That the bond was not surrendered to be cancelled. 3rd. That Burnham and Ruttan, on 11th August, 1834, did make their award in writing, under their hands and seals, and did thereby award that defendant should pay to plaintiff, &c., also that each of the said parties should pay to George M. Boswell, 1*l*. 1*s*. 3*d*., for drawing the said arbitration bonds and the award; also, that each of the parties should pay to the arbitrators 1*l*. 10*s*. each, for their attendance; and alleges non-payment of the money. To the 5th plea, that Burnham and Ruttan, did in due manner and within the time—viz. 11th of August—duly make and publish their award in writing, subscribed with their hands and sealed with their seals. To 6th plea, that Burnham and Ruttan did, before the 15th August, make such award as in the 2nd count is mentioned.

The following facts appeared at the trial, at the last assizes for the District of Newcastle. The plaintiff opened his case on an award under seal, which was produced under the hands and seals of Burnham and Ruttan, reciting the bond of submission: it is as if by all these arbitrators, but executed only by two. It directs that defendant should pay to plaintiff 25*l*. 6*s*. 6½*d*., on or before the 19th of February then next, &c., as in the replication to the 3rd plea, and was dated the 11th of August, 1834. It further appeared on the defence that on the 4th of August, 1834, Burnham, Ruttan and Brodie, signed the following paper: "We, the undersigned, arbitrators between John McCarthy and Rufus Holden, have decided that McCarthy pay to Holden 25*l*. 6*s*. 6½*d*. on or before the 19th of February next, and that each pay his own costs, and also that each pay to the arbitrators 1*l*. 10*s*. August 4th, 1834." This paper was first delivered by the arbitrators, and afterwards the award under seal was executed. The bond of submission did not require the award to be under seal. The question was, whether, under the circumstances, the plaintiff could recover under any, and if so under what count of his declaration.

The court were of opinion that the plaintiff could not



recover on either of the special counts, as neither of them set out the real award truly; that the paper first delivered was the true award; and that the plaintiff could not recover on the award brought forward by the defendant after the plaintiff's case was closed, particularly as it varied substantially from that which was declared upon and opened to the jury; and that the authorities shewed he could not in this case resort to the common counts.—6 Ea. 309; 8 Ea. 54; 1 Esp. 194, 377; Peake, N. P. C. 228; 4 B. & C. 968; 1 N. R. 104; 1 B. & B. 363; Cro. El. 600; Lit. Rep. 312; 1 Saund. 26, a.; 2 Saund. 62; 8 T. R. 571; 1 C. & P. 651; 3 Moore, 687.

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## LEITH V. WILLIS.

A shop-keeper may recover for spirituous liquors sold in less quantities than to the value of twenty shillings sterling at a time.

Assumpsit on common counts. At the trial the plaintiff proved an account for goods sold and delivered; which account embraced several small charges for spirituous liquors, sold by retail, of less value (at a time) than twenty shillings sterling. The plaintiff sold the liquors as a shop-keeper, in the ordinary manner, not as an innkeeper. The defendant objects that the British statute 24 Geo. II. ch. 40, is in force in this province, and bars the plaintiff from recovery on such cause of action. And this was the question for the opinion of the court.

ROBINSON, C. J.—The statute referred to is entitled “An Act for granting to his Majesty an additional duty on spirituous liquors and upon licenses for retailing the same, and repealing the act of the 20th year of his present Majesty's reign, entitled An Act for granting a duty to his Majesty, to be paid by distillers upon licenses to be taken out by them for retailing spirituous liquors and for the *more effectually restraining the retailing of distilled spirituous liquors*, and for allowing a drawback upon the exportation of British made spirits; and that the parish of St. Mary la bow in the County of Middlesex, shall be under the inspection of the head officer of excise.” The preamble recites that the immoderate drinking of distilled spirituous



liquors by persons of the meanest and lowest sort, had of late years increased, to the great detriment of the health and morals of the common people. It then makes various provisions respecting the licensing of public houses, and the management and appropriation of the duties laid on such houses. The statute has 32 clauses, of which not one with any reason can be considered as applicable to this province, or in force here under the introduction of the "law of England, as the rule of decision in all controversies relating to property and court rights," &c., unless it be the 12th section, on which the defendant relies. That section runs thus: "And be it further enacted, &c. that from and after the 1st July, 1751, no person or persons whatsoever shall be entitled unto or maintain any cause, action or suit for, or recover either in law or equity any sum or sums of money, debt or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and *bona fide* contracted at one time to the amount of 20s. and upwards, nor shall any particular article or item, in any account or demand for distilled spirituous liquors, be allowed or maintained where the liquors delivered at one time and mentioned in such article or item, shall not amount to the full value of 20s. at the least, and that without fraud or covin," &c.

Our own statutes containing no provisions that affect this question further than that they prohibit any persons except innkeepers from selling spirituous liquors by a less quantity than three gallons, unless they take out a license to retail it, &c., and no other than an innkeeper can sell a less quantity than a quart. By our statute 3 Wm. IV. ch. 1, sec. 7, it is enacted "that nothing in that act contained shall extend or be considered to extend to authorise the holding plea in the court of requests for any spirituous liquors drank at a tavern." Upon a view of the whole case, though I feel it difficult to rest the decision upon a perfectly clear ground, I am of opinion that the British act does not prevent the plaintiff recovering. It was passed in England to meet a particular evil, which was stated to be increased there of late, among a *particular class of the inhabitants*. We cannot say judicially that the circumstances so far corres-



pond in this province as to make it a reasonable intendment that a statute passed to meet such exigency in England is to be treated as a part of the general statute law of England, intended to be introduced into this province. The main scope of the statute is for purposes wholly foreign to us ; not one other clause, I think, *can* be considered in force *here*. It is derogatory to the principles of the common law, for it restrains a man from recovering a debt which may be lawfully contracted ; he is not prohibited to sell liquors to a less amount than 20s. at a time. If he may sell he has a right to sue for the price, and a law that would restrain him is penal in its nature, and we must see its application clearly before we apply it. As against shopkeepers, it has never been thought, as I conceive, to be in force here. I have seen almost at every court actions constantly sustained upon merchant's accounts which contained such items, and this constant allowance of such charges should have great weight with the court, if the question be not clear against the plaintiff. Shopkeepers pay a duty for their licenses, which allow them to sell in quantities as small as a quart ; and the act which imposes a duty on their licenses contains no prohibition against their recovering the price of whatever liquor they may sell. The British statute relied upon, on the contrary, puts the retailers fairly on their guard, for in the same act which regulates their licenses, they are expressly warned that they must not sell in small quantities on credit. If our parliament when they legislated on the subject, meant that the licenses to be taken out under their act should be attended with similar restrictions, they should have said so. They have been silent as to all retailers except innkeepers, who moreover are only disabled from recovering for spirituous liquors drank at their taverns. I think the legislature have manifested by this provision their impression that there was no such restriction in force here as in England, and they so far confirm the view I have taken of the question. Then they make a certain provision upon the point, but they extend it only to innkeepers selling liquors to be drank in their houses. Upon the principle that *expressio unius exclusio est alterius*, it follows that



innkeepers (and if innkeepers then of course all other persons) may recover in the Court of Requests for liquors legally sold to be consumed out of their houses. Whereupon the plaintiff, I think, is entitled in this case to his verdict without deduction for these items excepted to.

SHERWOOD, J. and MACAULAY, J., of the same opinion.

*Per Curiam*.—Postea to the plaintiff.

### HELLIWELL V. EASTWOOD ET AL.

Where plaintiff had a verdict to which on the merits as proved he was clearly entitled, and general damages were given; the court will not grant a new trial because the defendant merely has been entitled on technical grounds on some issues not involving the whole cause of action, which if a new trial was granted a repleader would also be awarded, in which case the plaintiff would have a right to a similar verdict with that given.

In trespass *quare clausum fregit*, to a plea of soil and freehold in the King, over which was a public allowance for road or highway, plaintiff replied that the soil and freehold was his and not that of the King, *modo et forma*. *Held*, that this replication put in issue the existence of such a public allowance for road, —*i. e.* a public allowance of which the soil and freehold was in the King.

Trespass.—The declaration contained four counts: 1st. That the defendant on the 1st September, 1832, and on divers other days, &c., broke and entered a certain close of plaintiff's, situate in the second concession of the Township of York, abutted and bounded to the northward and eastward by the high bank of the deep ravine and a small creek running into the River Don; to the southward and eastward, by meadow lands, in the occupation of Thomas Smith; to the northward and westward, by the high banks of the River Don, and certain lands in the possession of Francis M. Cayley; and broke open gates, &c., trampled down and consumed grass and corn with horses, &c., and subverted the soil, &c., and took down and destroyed fences, &c., belonging to the said close, and cut and threw down large quantities of earth and stones, wood and rubbish upon the said close, and hindered the enjoyment thereof. 2nd. For that defendants on the 1st December, in the year aforesaid, broke and entered a certain other close of plaintiff's, situate in the second concession of the Township of York, bounded to the north and east by lands in the occupation of one Thomas Smith; to the south-east, by the River Don; to the south-west by the River Don; and



broke open and spoiled other two gates, trod down and consumed the grass, and with horses, carts, &c., tore up and subverted the soil, and broke down and destroyed the fences of plaintiff—threw earth and stones upon the close, and hindered the enjoyment thereof. 3rd count. That defendant on the 1st of September in the year aforesaid, and on divers other days, &c., broke and entered divers, to wit, ten closes of plaintiff, situate in the second concession of the township of York, and broke, &c., as in the first two counts. 4th. That defendant on the 1st September aforesaid seized, took and carried away certain goods and chattels—to wit, fences, &c.—on the said close, &c. and other wrongs, &c.

Pleas:—1st. General issue to the whole declaration. 2nd. As to the trespass in the first count mentioned, in which, &c., and at the said several times when, &c., was the close, soil and freehold of our Lord the King, and then formed and still forms part of a public highway and allowance for road for all the liege subjects of our Lord the King, to go, pass and repass on foot, &c.—with cattle, &c. Wherefore defendants, having occasion to use, &c. the said way, went, passed, &c. into, through, and along the said highway, using the same as they lawfully might, for the cause aforesaid; and because the fence had been wrongfully erected across the said highway and allowance for road, and obstructed the same, &c., defendants, in order to remove the obstacle, did a little break down and destroy the fences and remove the same to a convenient distance, which are the trespasses, &c. 3rd plea. As to the trespasses in the last count, defendants say that the fences in that count mentioned had been wrongfully erected, and were then standing in and across a certain close of our Lord the King, the same being the said public highway and allowance for road in their plea to the first count of the said declaration mentioned, obstructing the same, so that without removing them defendants could not pass, &c., wherefore they removed them, as they lawfully might, &c.

Replication to the second plea.—That the said close in the first count mentioned now is and at the several times,



&c., was the close, soil and freehold of the said plaintiff, and not the close, soil and freehold of our Lord the King, in manner and form as defendants have in their second plea alleged; conclusion to the country. To the last plea—That the close in the last count mentioned is and was the close of the plaintiff, and not the close of our Lord the King, in manner and form as the defendants have in their plea alleged; conclusion to the country.

At the trial at the last fall assizes in the Home District, the plaintiff proved his title, deriving it from the original patent from the crown. There was evidence from which an inference arose that a reservation for highway had been originally intended to be made at or near the *locus in quo*, but the grant from the crown, when compared with the original plans of survey, clearly shewed that the *locus in quo* was covered by the patent, and unless restricted by the operations of the statute 1810, passed to the patentee. The plaintiff called witnesses to prove that, even admitting there was such an existing allowance for road, the trespass was committed on a part of his close not within the limits of the highway; and contended that, as the trespass and destruction of his fence exposed his fields and caused this injury he complained of, he was entitled to recover. The defendants contended that, as the plaintiff had not new assigned or replied *extra viam*, the second plea might be applied as a justification to whatever number of trespasses the plaintiff might prove within the boundaries of the close in the first count mentioned, and that he could not resort to the second count without proving a trespass in some other close beyond those bounds. To which the plaintiff answered that the close in the first count was assumed by the plea to be the alleged highway, and that, although under the first count the plaintiff, having conceded that, was restricted to trespasses committed upon the allowance for road in question, yet that the second count prevented the necessity of a replication *extra viam*, and entitled him to shew other trespasses in any other part of the second concession of the township of York except the allowance for road; and that under the third count he might shew any number of



trespasses on other closes in the township of York, whether in the second concession or elsewhere. The plaintiff had a verdict; and in Michaelmas term last *Sullivan* renewed the objection made at the trial and insisted that as the damages were given generally, that they were excessive, because partly given for an injury which ought not to have been considered by the jury as being on a plan admitted by the pleadings on the first count to have been an allowance for a road. The *Solicitor General* and *Draper*, shewed cause.

The cause stood over for judgment, which was this day given.

ROBINSON, C. J.—We are all of opinion that the evidence did not establish a public highway on any part of the ground where the trespass was shewn to have been committed; but we are called upon to consider the plaintiff's right to recover on these pleadings. In regard to the objections which have been raised on this ground, I think—1st. That upon the issue on the first count all trespasses proved to be on a public highway are justified. 2nd. That any trespass committed on plaintiff's lands, not a highway or freehold of the King, are clearly provable on the second count, and are not justified. 3rd. That on the issue on the second plea it is necessary for defendants to prove the *locus in quo* to be a highway. Their plea is descriptive of the kind of highway, and they are bound to prove it a highway of that class—namely “a public highway and allowance for road, of which the soil and freehold is in the King.” The plaintiff's replication that it is his own land negatives that justification, in my opinion; he affirms that the *locus in quo* is not the freehold of the King, and so not a highway of that description; but that it is his own private property, and cannot therefore be such a public allowance for road as the defendants allege. 4th. That if the proving merely that the *locus in quo* is the soil and freehold of the King would justify any trespass in the first count by reason of the form of the issue, still the defendant has not given such proof. 5th. That it is clear on the evidence some trespass was committed on land of the plaintiff's, which the alleged



highway would not cover, and for this the plaintiff is entitled to recover; and that being so, we are to see and judge on the evidence what the merits are, and not to grant a new trial because the jury have given damages which on the whole we may not think excessive in part for a trespass which from plaintiff's bad pleading is repelled in form, though we see that in fact it was a trespass. If a new trial were awarded we should grant a repleader, and then we see that the trespass could not be covered by the justification alleged—so that the plaintiff must ultimately recover whatever damages he has sustained; and as he may legally sustain the verdict on these pleadings, and there is no repugnance on the record, I think it would be protracting litigation to no good end to interpose on the ground of the damages being excessive, as applied to that part of the enquiry alone which may have arisen from a trespass in pulling down the fence out of the limits of the highway. The facts warrant a recovery for the whole, for there was in truth, as we are all satisfied, no highway on any part of it; and if we disturb this verdict, it would be merely in order to allow the record to warrant the verdict more fully at all points, an advantage of no importance, that I can see, to either party, while the continuance of the suit would entail an expense on both sides. If the damages were in fact excessive in proportion to the injury, the case would be different, but that has not been contended.

SHERWOOD, J. concurred with the Chief Justice.

MACAULAY, J.—It is my opinion, upon the whole—1st. That all the issues are established in favor of the plaintiff. 2nd. That under the second and third pleas the only issues are, whether the *locus in quo* was or was not the soil and freehold of the King, which is an immaterial issue, and involves the admission, or at least does not deny that it was a highway, as alleged by the defendant, which is the gist and substance of the defence under these pleas. Consequently, that the plaintiff cannot have judgment thereon, but that judgment must be for the defendants or be arrested, unless a repleader can be granted. 3rd. That the pleadings under the first count confine the plaintiff to trespasses on



that close, or that part of the close in which &c., called the allowance for road. But 4th. That under the second count (which alleges a single trespass only on a single day) the plaintiff may prove another trespass *extra viam*, though committed upon a place contiguous to, or within the same enclosure or close through or over which the alleged road passes, and this although to the second plea the plaintiff has not replied *extra viam*. 5th. Also, that under the third count, the door is open to proof of any number of trespasses, in any number of closes not exceeding ten, in the township of York, to which the pleadings under the other counts do not relate and restrict the plaintiff. Under the first count the plaintiff is tied down to a close, designated an allowance for road, being within the boundaries therein assigned—beyond such an allowance all other trespasses would seem open to him, to be proved, subject to be defended only under the general issue. 6th. That as the damages are general, including those assessed for trespasses in the *locus in quo* in the first count and in the second and third pleas mentioned, and in the latter alleged to be a highway, which is not denied, the plaintiff cannot have judgment for the same. It is not very clear upon the evidence, what (if any) trespass was committed *extra viam*. Of these three acts of trespass proved two at least would seem confined to the allowance for road; the third may have been beyond it, but that cannot entitle the plaintiff to full damages as for all of them. The verdict should be set aside and the pleadings amended, or else the judgment stand arrested.

*Per Cur.* (Macaulay, J., *dissentiente*).—Rule discharged

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#### LAMB V. MULHOLLAND ET AL.

The statute of 4 Wm. IV. ch. 12. for regulating line fences, does not operate to overrule or disturb any agreement made between parties respecting division fences between them. It comes into effect in the absence of any such agreement and where the parties dispute on which of them the obligation to make or repair such division fence lies.

Trespass, *quare clausum fregit*, and for taking plaintiff's horses, &c. On the trial, at the last assizes for the District of Gore, it appeared that Lamb and Mulholland possessed



adjoining farms, and that two of the defendants distrained several horses of the plaintiff's for trespassing in the close of Mullholland, and impounded them with the third defendant, who not having interfered otherwise than as a pound-keeper, was acquitted. It was alleged that the horses escaped from a close of the plaintiff's into a close of Mulholland's, through defect of fences which the plaintiff ought to have repaired, as to which it was in evidence that there had long been a division fence kept up by the respective occupiers of the several premises, and the controversy turned upon which portion the one or the other was bound to maintain. It was said the horses escaped over the north part of the fence, which was clearly insufficient; but the defendant contended that it belonged to the plaintiff to sustain that part, wherefore it was through his own default that the trespass was committed on the defendant, while the plaintiff asserted that it belonged to the defendant to keep the north part and to the plaintiff to preserve the south part of the fence in question. The liability of each, respectively, was deduced from the mutual understanding that had prevailed and been acted upon by former occupants for a series of years; but there was conflicting evidence as to whom it appertained to uphold the north-half of the line; and the jury was of opinion that it was the duty of the defendant Mulholland, wherefore they found a verdict against the two defendants who seized the horses, with 2*l.* 5*s.* damages, the amount paid to redeem them. Damages were not enhanced, because the defendant seemed to have acted sincerely, under the impression that the plaintiff was in default, which the evidence shewed he had good reason for entertaining. Reference was had to the provincial act of 1834 respecting fences, which requires each party to keep up and repair a fair and just proportion of the line fences; and provides that in cases of dispute the same should be referred to fence viewers for decision, and it was contended that fence viewers alone could decide the present controversy, and that courts of law could not hold jurisdiction over the matter.

MACAULAY, J., who tried the cause, did not think the



parties precluded from bringing the subject before the court, in which event the jury was substituted for the fence viewers; wherefore he referred to the jury to declare, as if they were fence viewers, who was bound to repair that part of the fence over which the horses escaped, and whether it was or was not a lawful fence at the time: they pronounced the liability to rest on the defendant, and that the fence was insufficient.

In Michaelmas term last *O'Reilly* obtained a rule nisi for a new trial, renewing the objection urged on the defence. *McNab* shewed cause.

ROBINSON, C. J.—I think the verdict for the plaintiff was proper. It was not intended, as I conceive, by the legislature to overrule or disturb any existing agreement between proprietors of adjoining lots, but rather to afford convenient and summary means of compelling each to act equitably, where they would come to no express understanding. The second clause of the act says, that when there shall be a dispute between the parties as to the commencement or extent of the part of the fence which either party may claim or refuse to make or repair, it shall be lawful for either party to submit the dispute to three fence viewers, &c. Now it was not shewn that there was any dispute here, but simply that an agreement had subsisted which was not observed; and I see nothing to disable the court and jury from determining upon whom the obligation to repair lay, under the facts proved to them.

SHERWOOD, J. and MACAULAY, J., of the same opinion.

*Per Cur.*—Rule discharged.

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### THOMSON V. HAMILTON, ESQ., SHERIFF.

A sheriff sent his clerk to plaintiff's attorney before action brought, saying that certain monies collected on an execution in favor of plaintiff were ready to be paid: the clerk had not the money with him, nor did he offer to go for it; but the attorney said he would not receive it without the costs of a rule on the sheriff to return the writ were also paid. *Held* that these facts would not sustain a plea of tender.

This action was brought to recover a sum of money levied by the defendant on a *fi. fa.* in favor of plaintiff. The defendant pleaded a tender, on which issue was joined.



At the trial it was proved that after the money was made on the *fi. fa.*, the deputy sheriff, living in Niagara, sent his clerk to the office of the plaintiff's attorney, which is in the same street with the sheriff's office, two or three hundred yards distant, to tell the attorney that the money was collected and was ready to be paid to him. The clerk had not the money with him, and it was not proved that he made any offer to go for it. The attorney said he must have the costs of a rule which had been ordered on the sheriff to return the *fi. fa.*, and that he would not take the money without these costs. The clerk, hearing this, returned home. This was on 2nd February, 1835. On the 11th February this suit was commenced, nothing having passed in the mean time. On the 12th the deputy tendered the money in his office, too late bar to this action. The jury found for the defendant.

In Michaelmas term last *Campbell, E. C.*, obtained a rule nisi to set aside the verdict. *Boulton James* shewed cause.

ROBINSON, C. J.—I hoped to find (looking upon this proceeding as harsh against the sheriff,) that the plea of tender might be maintained, but upon a careful review of the cases, I am satisfied that it cannot. There was no evidence that the sheriff's clerk had the money with him, nor that he made any offer to go for it. If this would support a plea of tender, then it would amount to this that *paratus solvere* with notice of the readiness, would be a good defence; but nothing is clearer than that a plea, without the express averment that defendant *obtulit solvere*, would not be sufficient. There is in reality no hardship in this case, except what may arise from a want of vigilance or a misapprehension in the sheriff himself or his attorney. The court would have interposed promptly for his relief on application to stay the action. There would be no object in staying it at this late stage, unless it could be done without paying costs, but no application for this purpose is before us—3 T. R. 684; 10 Ea. 101; 4 Esp. 68; Peake, N. P. C. 88; 5 Esp. 48; 3 Camp. 347; 3 B. & A. 696; 7 D. & R. 119; 3 C. & P. 342; 2 C. & P. 77; 5 D. & R. 28. See Bing's New Cases, 253, *Finch v. Brook*.



There must, in my opinion, be a new trial without costs.  
SHERWOOD, J., and MACAULAY, J., of the same opinion.

*Per Cur.*—Rule absolute.

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WRAGG V. JARVIS Esq., SHERIFF.

In a declaration for an escape on a writ issued from a District Court the making and filing of an affidavit of debt must be alleged.

Debt against the sheriff of the Home District for an escape of a prisoner in execution. The declaration set out a judgment obtained in the District Court in favor of the plaintiff, against one Ann Devlin, executrix, &c. ; the issuing of a *ca. sa.* on that judgment ; the delivery of the writ to the defendant and the arrest of Ann Devlin by him on that writ, and the escape of the prisoner from defendant's custody ; but there was no account of the making and filing an affidavit in the District Court to warrant the issuing of the *ca. sa.*, and it was admitted that no affidavit was ever made, but if one had been made the proof of it at the trial would have availed the plaintiff nothing, because it was not alleged in the declaration. There had been a demurrer in this case to the replication to the second plea, on which the plaintiff had judgment. A trial also had taken place. And after judgment on the demurrer, and after the time for moving for a new trial had expired, *Sullivan* obtained a rule nisi to stay further proceedings, on the ground that no affidavit was in fact made or filed to warrant the issue of the *ca. sa.*, in the original action against Ann Devlin, and that in consequence of the discovery of that defect the *ca. sa.* had been set aside in the court below ; and that as the writ itself, which was the foundation of the action against the sheriff, no longer existed, and in fact never had a legal existence, in justice the sheriff should be relieved. *Washburn* shewed cause—relying on the length of time which had taken place, and that the defendant was after these proceedings concluded from urging this defence.

ROBINSON, C. J., expressed himself of opinion that the rule should be made absolute on payment of costs. It now



clearly appeared that this action ought never to have been brought, for the prisoner for whose escape it was brought was never in legal custody, and consequently there could be no escape.

SHERWOOD, J.—The declaration is either good without the allegation of the making and filing an affidavit in the District Court to warrant the issuing of the writ of *ca. sa.*, or it is bad; and in either case the motion to stay the proceedings, I think, is improper. The sufficiency of the declaration should have been considered when the defendant's demurrer to the plaintiff's replication to the defendant's second plea was argued; but the declaration was not at all alluded to in the argument, and for my own part I did not observe any defect in it at the time. I agreed to the judgment on the demurrer. In considering the grounds of the present motion and the case of *Ferrier v. Dyer and McDonell*, lately determined in this court, I have been led to examine the declaration in this cause with more critical attention than I did in the first instance, and I think I am wrong in the opinion I formed on the demurrer to the replication before stated. I incline to think the common law, as well as the statute 4 Ann, ch. 16, sec. 1, renders it the duty of the court to look to the whole record when either party demurs, although the objection actually brought under the consideration of the court by the counsel extended only to a part of the pleadings on the record. It is a rule of law that if any part of the pleadings be bad, judgment shall be against him who made the first default, as if a count or declaration be bad there shall be judgment against the plaintiff although the bar be insufficient—5 Co. 29, a.; 1 Saund. 285; 4 Ea. 502. There are some exceptions to this general rule, but the present case, I think, does not come within the principle of any of them. In the Court of King's Bench in this province a *capias ad respondendum* lies in process as an original writ, and therefore a *capias ad satisfaciendum* lies after final judgment, as a matter of course—3 Co. 12, a. The plaintiff, however, is restrained from taking the defendant to trial on a *ca. re.* in certain cases by the provincial statute 2 Geo. IV., ch. 1, sec. 8; and he is also prevented from



suing out a *ca. sa.* in some cases after judgment, without first making and filing the affidavit mentioned in the 15th section—10 B. & C. 202. I think it might be safely avowed as a general rule, according to the doctrine established in modern cases, that if a plaintiff in this court sue out a *ca. sa.* on a judgment of this court, upon which the sheriff arrested the debtor, who afterwards escapes, such plaintiff in bringing an action for the escape need not allege in his declaration the making and filing an affidavit before the *ca. sa.* issued, according to the provisions of 2 Geo. IV. before mentioned. The original process of this court being a *ca. re.*, the writ of *ca. sa.* follows of course, unless in certain excepted cases; and as this court cannot know when an excepted case occurs, the party in whose favor the exception occurs is bound to show it. In the District Court the original process is a writ of summons, which may of right be sued out in all cases by the 2 Geo. IV., ch. 2, sec. 5, but by sec. 8 the court is authorised to issue writs of *capias ad respondendum* on all judgments regularly entered in the court. By the 6th sec. it is provided that before any such writ issued out the same affidavit as may by law be required to authorise the issuing of a like writ from the Court of King's Bench shall be made and filed. The statute, therefore, gives the District Court authority to issue a writ of *capias ad respondendum* only in matters of contract, and not even in such causes of action unless an affidavit of their existence is first filed, thereby limiting the right of the inferior court to issue such a writ within the same bounds as the right of a plaintiff in this court is restricted in suing out a like writ here. The District Court has also the same right to issue a writ of *ca. sa.* on a judgment entered there as a plaintiff has to sue out a writ of *ca. sa.* from this court after final judgment has been entered here. As the District Court has no general authority to issue writs of *capias ad respondendum*, there can be no legal presumption that it has a right to issue writs of *capias ad satisfaciendum*; and hence, I think, arises the necessity of setting out in the declaration such facts as shew a legal authority in the District Court to issue a writ of *ca. sa.* The necessary facts for this



purpose are, that the defendant in the suit was held to bail by virtue of an affidavit made and filed of the terms of the contract, or that a writ of *ca. sa.* issued against him after final judgment upon filing the affidavit required by law. The declaration in this count contains neither of these allegations, and therefore I think it was insufficient in law to sustain this action. The pleadings is also bad on another ground. Ann Devlin was sued as executrix of Christopher Devlin, and the declaration contains nothing to shew a *devastavit* on her part, without which she could not legally be arrested in her character as executrix, as the fact was. As the plaintiff cannot support his action on the pleadings on the record, the next enquiry is, what relief can the defendant have at this late stage of the proceedings. According to the ancient practice of the Court of King's Bench in England, when the defendant had good cause to shew why a judgment on execution should not be enforced by reason of a subsequent release having been given or the like, the only mode of proceeding for redress was by writ of *audita querela*. This was a remedial writ invented to prevent injustice where a party had a good defence, and by the ordinary forms of law had no opportunity to make it. From the liberality of modern practice, by giving summary relief to the party by motion, the action of *audita querela* has become altogether obsolete, but it is still useful to examine the principles of that action, because they must in a great measure govern applications like the one now before the court. In this instance the defendant had ample opportunity to urge the defence on which he now relies, and therefore cannot be relieved upon it, by staying further proceedings in this summary manner. He cannot resort to the Court of Appeals for redress, because the amount of the damages is under 100*l.*, but I think he may move in arrest of judgment in this case, although judgment has been given on the demurrer. It is undoubtedly laid down as a general rule in all books of practice that you cannot move in arrest of judgment after there has been judgment on the demurrer. The first modern case to restrain this principle is *Edwards v. Blunt*, *Str.* 426, but it is reported



with much brevity, and the court merely say—"The parties cannot be said to come as *amici curiæ*, nor shall anybody tell us the judgment we gave on mature deliberation is wrong." This does not appear to me to be the true reason for the rule; but I think it is found in *Creswell v. Porham*, 6 Taunt. 650—namely, "that the defendant is not without remedy by writ of error;" and I think it must be clearly inferred from the remarks of the Court of Common Pleas in that case, that they would have given the defendant relief on the motion in arrest of judgment, if he were without remedy by writ of error. If no judgment had been given on demurrer, the courts are bound to arrest the judgment for any intrinsic defect appearing on the face of the record which cannot by law be amended, and for which a writ of error or an appeal would be to a higher tribunal. Now if such a defect be manifest, and the defendant be altogether without remedy by writ of error or appeal, natural justice demands that redress should be given by the court which possesses the power of giving it, although there is judgment on demurrer, because the case does not come within the scope and spirit of the general rule relative to demurrers. It necessarily forms an exception from its peculiar circumstances, and therefore justifies the court in proceeding in such a way as will prevent injustice, by entertaining a motion in arrest of judgment contrary to the practice of the court, when an appeal or writ of error can be brought. I am therefore of opinion that the rule should be discharged, and the defendant should be allowed to move in arrest of judgment as forming the only mode of proceeding except a writ of error when the defect appears upon the record itself. In 2 Roll. Ab., title Trial H., it was said the defendant may shew any matter in arrest of judgment after judgment on demurrer, in an action of assumpsit; which clearly shews it was not the ancient practice of the Court of King's Bench in England to refuse a motion in arrest of judgment at that stage of the proceedings in such an action, and it is very probable it was not in any other part of the proceedings till introduced by modern practice.



MACAULAY, J., thought the true reason why after judgment on demurrer the court would not allow a motion in arrest of judgment was, that the matter had passed in *rem judicatam*, and the court could not be called upon to pronounce judgment on the same proceedings. He thought that, consistently with the authorities and established practice, the judgment could not now be arrested. He also expressed himself of opinion against the rule for staying the proceedings.

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MUNSON v. HAMILTON, ESQ. SHERIFF.

In debt for an escape, the sheriff cannot plead satisfaction previous to the issue of the writ, in bar of the action. Such plea is bad on general demurrer and by pleading such defence, he waives an objection to the declaration, (viz. that the judgment being in a district court, no affidavit was averred to warrant the issuing of the *ca. sa.*) which would have otherwise prevailed.

Debt for escape on execution. The declaration set out a judgment in the District Court of Niagara, in an action by the present plaintiff against one Talbot, for 15*l.* 3*s.* 10*d.*, for damages and costs in assumpsit; that plaintiff sued out a *ca. sa.* on such judgment on 28th January 1834, directed to the sheriff of Niagara, returnable on the 10th March then next, endorsed to levy 9*l.* 14*s.* 4*d.*, &c., and that defendant before the return arrested Talbot and voluntarily suffered him to escape—the said sum of 9*l.* 14*s.* 4*d.*, being then wholly unpaid and unsatisfied to the said plaintiff. The defendant pleaded, that on the 23rd May 1833 plaintiff sued out a *ca. sa.* on the judgment, directed to the sheriff of Niagara, in which writ it is recited that part had been levied under a *fi. fa.*, and the sheriff was directed by the *ca. sa.* to make the residue: this writ was returnable 24th June 1833, and endorsed to make 9*l.* 4*s.* 11*d.* besides fees; that this writ before the return was delivered to R. Leonard, Esq., sheriff of Niagara, who before the return arrested Talbot, and kept him in custody until he fully paid and satisfied the said writ of *ca. sa.*, and the said sheriff's fee—to wit, 9*l.* 4*s.* 11*d.* endorsed, besides sheriff's fees; and that on the 26th June 1833 the said R. Leonard, still being sheriff, returned that by virtue of the said writ he had taken the said Talbot, whose body he had ready as commanded; and so



defendant says that the said judgment was long before the issuing of the said writ of *ca. sa.* in the declaration mentioned, satisfied and discharged. To this the plaintiff demurred generally.

The demurrer was argued by *Sullivan* for the plaintiff, and — for defendant.

ROBINSON, C. J.—The demurrer in this action is to the defendant's plea, but it has thrown upon us the necessity of considering whether the declaration is sustainable; and I was for some time of the opinion that it was fatally defective, in not setting forth that an affidavit such as the District Court requires was made and filed before the writ of *ca. sa.* issued on which the debtor was detained: but I am satisfied that no objection on this ground can now be taken to the declaration. When the sheriff is sued for an escape of a person arrested on a process of execution from an inferior court, it is now settled that he cannot object that the declaration does not sufficiently shew the jurisdiction of such inferior court. As against him it will be presumed the process justifies him in making the arrest, and he is not to put the plaintiff to shew that the court had jurisdiction. Moreover the debtor in the original cause has had the opportunity of excepting to the jurisdiction, and if he has acquiesced in it, it is not necessary in the action against the sheriff for the escape to make the jurisdiction appear.

But here an affidavit is necessary, to give to the District Court jurisdiction to grant a writ of *ca. sa.*, and without it it is as absolutely void as it would be if there were no judgment to support it; and of course the verdict in the original action can have no influence in dispensing with the necessity of shewing what is essentially necessary to support the writ of execution. I am of opinion therefore, that upon demurrer to the declaration this exception must have prevailed; but the defendant in this action, by resting his defence on a collateral matter, has rendered this exception unimportant. —3 Lev. 393. He pleads that the plaintiff sued out a writ of *ca. sa.* before the present, under which the debtor was arrested and in the custody of the sheriff, and detained until that writ was fully discharged. Besides that the resting



upon this defence waives any objection to the legality of the *ca. sa.* set out in this action, it is to be supposed the defendant intended to aver a legal writ, under which, as he says, satisfaction was obtained; but that first *ca. sa.*, in order to have been legal, must have had an affidavit to warrant it, and if so, then no subsequent affidavit was required for the second. It does not appear on this record that there was in fact no affidavit. The plea, I am of opinion, is bad; for I take it that the sheriff, so long as the judgment and execution remain in force, cannot be allowed to defend himself by shewing the debt satisfied. If he could shew the process under which he acted discharged or satisfied, that defence would avail him; but he cannot shew a previous satisfaction, in order to avoid the process. It is true that the plaintiff in his declaration avers, as usual, that the sum endorsed on the writ remained unsatisfied at the time of the escape, but this is said not to be necessary, for it shall be presumed; and besides, that evidently means that no satisfaction had been obtained upon the writ on which the arrest was made. 1 Roll. 47; Com. Dig., Pleadings 2 P., 1.

SHERWOOD, J.—The plea is clearly bad, for the sheriff Leonard, was not the agent of the plaintiff to receive the debt and costs from the prisoner Talbot, and had no right to discharge him before the plaintiff was paid, in case the writ was good; and the plaintiff would have been entitled to take out a fresh writ of *ca. sa.* after the discharge, because it would have been an escape in law under such circumstances.—14 Ea. 468.

I think it is the duty of the court to look at the whole record upon a demurrer, in order to ascertain whether the previous pleading is correct; and upon examination of the declaration I incline to think it is bad and cannot be sustained; and therefore the defendant is entitled to judgment, although his plea is vicious. The District Court has not a general but limited authority to issue writs of *ca. re.* and *ca. sa.*: the ordinary process in that court in all matters within its jurisdiction being a summons before judgment and a *fi. fa.* after. This latter writ lies by common law in all cases where the plaintiff has judgment for debt or damages, either



in a superior or inferior court. The writ of *ca. sa.* lies in all cases after judgment, when the suit is commenced by *ca. re.*, but not where it is commenced by summons, unless allowed by statute. In actions in inferior courts it is necessary that every part of that which is the gist of the action should appear to be within their jurisdiction; and the superior court can supply no defence by intendment. I therefore think in this case, it was not enough merely to state in the declaration a writ of *ca. sa.* issued from the District Court against Talbot, upon which the defendant arrested him; but the plaintiff should have gone further, and should have stated some fact by which the authority of the court to issue the writ would have appeared, if such fact really existed. For instance—that the *ca. sa.* issues upon an affidavit made and filed as directed by the District Court Act, either before or after judgment, if such a document had been made and filed. The action in the District Court might have been commenced by *capias* or by summons, but there is no means of determining upon demurrer by which process Talbot was sued; and as the ordinary mode of bringing actions in that court is by summons, the presumption is that this action was brought in that way, rather than by *capias*. Supposing the action was commenced by summons—then by 2 Geo. IV. ch. 2, sec. 9, the District Court could not issue a writ of *ca. sa.* till an affidavit were made and filed conformably to 2 Geo. IV., ch. 1, sec. 15; and I think that this court cannot presume that such affidavit was made and filed upon any legal principle applicable to inferior courts. Without the affidavit the writ of *ca. sa.*, I think, was void by 2 Geo. IV., ch. 2; and the sheriff was not liable for an escape. I think the fault in in the declaration is a fault in substance and not in form, and could not be aided by pleading over, or even by verdict. If the plea in bar had stated that an affidavit had been made and filed according to law before the issuing of the *ca. sa.*, the defect in the declaration would have been cured; but the defendant's plea makes no allusion to an affidavit, and therefore the fault remains in the declaration, unaided by the plea.



MACAULAY, J. concurred in opinion with the Chief Justice.

*Per Cur.*—Judgment for plaintiff on demurrer.

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BOYD AND REID V. DURAND, ADMINISTRATOR, &c.

In debt on bond conditioned to perform an award, a plea setting forth mere legal grounds of objection to the award and tendering an issue to the country, is bad. If the award consists of two separate parts, defendant cannot plead in bar of the whole any matter which answers only one part; and if plaintiff in his replication to a plea of no award assigns two breaches, he is entitled to judgment on a general demurrer, though only one of them be sufficiently assigned.

Debt on bond, dated 26th October 1816, in penalty of 20,000*l.* The defendant craves oyer and sets out the condition, which is to stand to the award of Wm. Kemble and James McLean, Esqs., of all matters in difference between Colcleugh, Boyd and Reid, and the intestate James Durand, or between Boyd and Reid as surviving partners of Colcleugh, Boyd and Reid, in their own right; and J. Durand, &c., of all accounts and reckonings, sums of money and effects, stocks, chattels and other things, had, made, received, paid and disposed of by the said James Durand; and concerning all disputes and differences now subsisting between the said Durand and Boyd and Reid, either as surviving partners of Colcleugh, Boyd and Reid, or in their or either of their own right, in relation to the title of certain freehold and leasehold estates, conveyed or assigned by the said Durand to Colcleugh, Boyd and Reid, and to Boyd and Reid, and touching all actions, &c., so as the award be made, &c., on or before the 1st December 1816; and then pleads *non est factum*. 2nd plea. No award on or before 1st December 1816. 3rd plea. That the arbitrators on 1st December 1816 did make their award, whereby, after reciting as is therein recited, they awarded that Durand, his executors, &c., should on or before the 1st January next ensuing the date, pay to Wm. Dickson of Niagara, or Thomas Clark and Samuel Street, or some one of them, *attornies of the said Boyd and Reid*, at the dwelling house, &c., 2484*l.* 7*s.* 6*d.*, it being the principal and interest that has accrued on the sale of the Bridgewater Mills, sold to Messrs. Clark and Street by the said James Durand; and



that the sum of 130*l.*, paid to the assignees of one Todd of Quebec by Durand, should go in part payment of this said sum; and also that the sum of money that might then be due by Messrs. Clark and Street on their obligations given to Durand for the Bridgwater Mills and works, should go in part payment of the said 2484*l.* 7*s.* 6*d.*; and that Durand should pay to William Dickson, Thomas Clark and Samuel Street, as attornies of Boyd and Reid as aforesaid, the further sum of 550*l.*, by endorsing certain promissory notes of one G. Hamilton to Durand for that amount, in payment of lands purchased by him of Durand, and that Durand should, on or before the 1st of March then next, execute to Boyd and Reid, their heirs and assigns, such quit claim deed of 1200 acres in Wainfleet as Dickson, Clark and Street should require for releasing the said land to Boyd and Reid; and on failure thereof Durand should, on or before 1st March next ensuing, pay 2000*l.*; and that Durand should pay to Dickson, Clark and Street, as attornies of Boyd and Reid, the further sum of 1250*l.*, in four annual instalments, on the 1st of December in each of the four years next ensuing: and that on payment of the said last mentioned sum of money by Durand, the said Dickson, Clark and Street, as attornies of Boyd and Reid, should remise and quit claim by a sufficient instrument in writing, under the hands and seals of Dickson, Clark and Street, all lands houses and real estate, conveyed by Boyd and Reid in a certain conveyance, dated in London, (except the 1200 acres in Wainfleet—the Bridgwater Mills and the 23 acres sold to George Hamilton): and that Dickson, Clark and Street, as attornies as aforesaid, shall by a fit instrument in writing assign, transfer and set out to Durand; his executors, &c., all the debts, dues and demands due and owing, whether by judgment, bond, note or book account, to the late firm of Burton and McCulloch: and that all actions, &c., commenced or depending between Boyd and Reid, as surviving partners or in their own right, and Durand, for any matters arising before the arbitration should cease, &c.: and that Dickson, Clark and Street, as attornies of Boyd and Reid, and Durand, should within six months after the date of the



award, seal and execute mutual releases of all actions, &c., to the date of the submission bond; and each should pay half of the costs of the arbitration, which are the whole of the matters then awarded. Defendant then avers that the award is not final, and that although it is awarded that Durand should execute a general release, &c.; it is not awarded that Boyd and Reid should release, &c., and so the said award is bad, defective and wholly void in law, for the cause aforesaid; and this he is ready to verify, &c.

4th plea refers to the award as set out in the third plea, and avers that Dickson, Clark and Street at the time of the submission or since, had not nor had either of them, as attornies or attorney, or for or on behalf of the said Boyd and Reid, any power or authority from the said Boyd and Reid to remise, release and quit claim by a sufficient instrument in writing, under the hands and seals of the said Dickson, Clark and Street, or in any other manner, all lands, houses, and real estates, conveyed by Durand to Boyd and Reid in a certain conveyance, dated in London, (except the 1200 acres, &c.), or as attornies as aforesaid, by a fit instrument in writing, or otherwise howsoever, to transfer and set over to the said Durand all the debts, &c., due and owing (as in the award) to the late firm of Burton and McCulloch, or as attornies as aforesaid, within six months: to execute to Durand a general release of all actions, demands, &c.; and this he is ready to verify.

5th plea, after setting out the award, avers that the release, &c., to Durand, of the houses, lands and real estate in the award mentioned to have been conveyed to Boyd and Reid, was and formed a large part of the consideration of and for the said several sums of money, and other debts and things awarded to be done by Durand, and that no remedy or means was given or appears in or by the said award to Durand to enforce or compel the remising, releasing, &c., by or on the part of the plaintiff to Durand deceased, of the same lands, &c.: and so the award is wholly void in law, for the causes aforesaid; and this he is ready to verify. 6th plea. *Plene administravit*. 7th plea. Judgment recovered and no *assets ultra*.

Replication to the 2nd plea, setting forth the award as the



defendant did, (without the recitals) and notice of the award to Durand, assigns breaches :—1st, that Durand did not on 1st January in the award mentioned pay to Dickson, Clark and Street, or either of them, at, &c., or elsewhere, the said 2484*l.* 7*s.* 6*d.*, after deducting the said 130*l.*, paid to the assignees of Todd, and after deducting and allowing in part payment thereof 1756*l.* 7*s.* 6*d.*, due by Messrs. Clark and Street to Durand for the Bridgewater Mills : and 2nd, did not pay to Dickson, Clark and Street, as attornies of plaintiffs, or either of them, the further sum of 1250*l.*, in five annual instalments ; nor has defendant's administrator since paid the same. To the 3rd plea, demurrer—assigning for cause that it is double, alleging two matters in avoidance of the award—that plaintiff cannot take a certain issue upon it ; that it consists altogether of matters of law, and is argumentative. To 4th plea—general demurrer. To 5th—general demurrer. To 6th plea—takes issue. To 7th plea—replies *assets ultra*. Defendant demurred to the replication to the 2nd plea. The demurrer was argued in Hilary Term last, by *Draper* for plaintiff, and *Sullivan* and *O'Rielly*, for defendant.

ROBINSON, C. J.—The plaintiff is entitled to judgment, I think, upon his demurrer to the defendant's 3rd plea. It is bad—1st, because it raises legal objections to the award ; and defendant puts himself upon the country as if he was tendering an issue in fact. If the award is not final and is defective in not ordering a release, those were legal objections apparent on the face of the award ; and the proper course was to have denied that an award was made, and then, when plaintiff set it out, to demur.—11 Ea. 188. It is the judgment of the court, and not the jury, which is desired upon these objections. The plaintiff is also entitled to judgment on the 4th plea, because the matter there pleaded does not excuse the defendant from complying with the first part of the award : he is, in my opinion, bound to pay whatever balance may have remained unpaid of the 2484*l.* 7*s.* 6*d.*, after deducting the 130*l.* paid in Quebec and the sum due by Messrs Clark and Street to Durand. What the defendant says the plaintiffs are unable to fulfil



forms no part of the consideration for this part of the award; and of course if the plea does not answer the whole declaration, as it professes to do, it is insufficient.

The 5th plea is bad, for the same reason as the 3rd. The defendant puts himself on the country upon an issue which is not triable by the country. The demurrer to the replication to the defendant's 2nd plea brings the question of the validity of the award properly before the court. The plaintiff sets out the award as the defendant had in his plea, omitting the recitals, so that they nowhere appear to us, though it is averred that the award is prefaced by recitals: He thus sets out two breaches:—1st, in not paying the residue of the 2484*l.* 7*s.* 6*d.* 2nd—not paying the 1250*l.* by instalments. If either of these breaches is good—that is, if defendant is liable to pay either sum, (the award being good for so much) then this demurrer to the replication must fail.—3 T. R. 377. The award in my opinion, is undoubtedly good as to the balance unpaid of the 2484*l.* 7*s.* 6*d.*; and as to that may be sustained which supports the breach first assigned.—3 Lev. 414. An attentive consideration shews that Durand was to account to plaintiff for the whole purchase money of the Bridgwater property, which we may infer from the award was in effect the property of the plaintiff when Durand sold it to Messrs. Clark and Street. The reconveyance or release to Durand of all the estate which Boyd and Reid had received by assignment from him, is expressly dependent on Durand paying the 1250*l.*, and cannot be claimed before; and the transfer of the debt due to Burton and McCulloch is awarded after this, and seems to me to be equally postponed to the payment by Durand of the 1250*l.* But further, I think we are not at liberty upon this demurrer to hold, upon the mere inspection of the award, that the agents or attornies of the plaintiffs' could not do all that they are directed to do by the arbitrators. It is true their authority does not appear; but all the award is not set out. How can we tell that the recitals do not set fourth their authority? We are not to conclude that the arbitrators awarded impossibilities. Their award is not to be decided upon as a plea, because they are not under the



necessity of setting out all extrinsic facts that may be necessary to shew their award reasonable and such as can be carried into effect. If the agents had the power, or have it when they can be called upon to exercise it, that is sufficient. Intendments are now made liberally in support of awards, and they are not to be adjudged void when for all that appears they may be good. However, I give no judgment on this second breach: that may be objected to at the trial and the judgment of the court had upon it.

SHERWOOD, J.—I am of opinion the defendant is entitled to judgment in this case upon the demurrer to the 4th and 5th pleas, and on the replication to the 2nd plea. It will therefore be unnecessary for me to consider any other part of the pleadings. The 4th plea admits the making an award by the arbitrators, but alleges against its legality that neither Dickson, Clark or Street, or either of them, had at the time of making the award, or since, any power or authority whatever from the plaintiffs, as their attornies and on their behalf, to remise, release and forever quit claim to the said James Durand deceased the estate and interest of the plaintiffs in certain lands, houses and real estate which had before that time been conveyed in fee by the intestate to the plaintiffs; or to assign, transfer and set over to the intestate all the debts, dues and owings to the late firm of Burton and McCulloch, or to seal and execute a general release to the intestate, as mentioned and ordered in the award. The 5th plea sets out the substance of the award, and concludes by alleging that the remising, releasing and quit-claiming unto the intestate, the lands, houses and real estates in the award mentioned to have been conveyed to the plaintiffs by the intestate, &c., formed a large portion of the consideration of and for the said several sums of money and other acts and things in and by the said award ordered by the said award to be paid, done, and performed by and on the part of the said intestate. Messrs. Dickson, Clark and Street, were not parties to the submission, and therefore were never compelled in any way to perform the part of the award in favor of the intestate; and the plaintiffs themselves are not directed to do anything. Under



such circumstances, I think that part of the award which was intended to confer any benefit or advantage on the intestate is altogether a nullity, as it stands admitted in the 4th plea that Dickson, Clark and Street, never had any power or authority from the plaintiffs to carry the provisions of the award as regards the intestate into effect. Neither the submission or the award shew any such power or authority to assign personal property or convey real estates, as the attornies of the plaintiffs; and the court, in my opinion, cannot presume the fact. The inability of the intestate to oblige the plaintiffs, or Dickson, Clark and Street, to perform the award, consequently appears on the face of the submission and the award. There are many cases to shew that awards may be good in part and bad in part, and may be carried into effect so far as they are good, and there are other cases which shew that an award bad in part is bad for the whole. It remains therefore to consider under which class of cases this award should be placed. In Comyn's Digest, title "Abitrament," p. 19, it is said: "If by the nullity of the award in any part, the one shall not have all the advantage intended him, as a recompence for that which he does for the other, it shall be void for the whole, though it would be mutual, notwithstanding the null part is rejected."—1 Sid. 160; 1 Leon. 113. A parol award is void which awards money to be paid by the one and a release by the other, for there is no money for the release when the award is by parol. An award that A. shall be paid by B. money due for back work; and that A. should pay 25*l.* to B., and that the parties should give each other a general release, is void on the whole, for the uncertainty what sum should be paid for back work. The case of Cockson v. Ogle (2 Saund. 292; 1 Lat. 559) clearly establishes the principle, that if the consideration for the act directed by the award be done by one party wholly fails, the award is void altogether. A defect in substance will vitiate the whole award.—Willis. 248; 2 Chit. 594. The arbitrators awarded that the defendant should give up to plaintiff one road way and that he should have the other; but as it did not appear by the award that the defendant could have a



good title to the latter road way, the award was held void in toto.

The 4th plea shews that Dickson, Clark and Street had no authority to act for the plaintiffs; and the award itself shews that what they were directed to do for the intestate was the recompense he was to receive for what the award ordered him to do for the plaintiffs, and for which this action is brought. The 5th plea shews that what Dickson, Clark and Street were ordered to perform for the intestate made up a large part of the consideration for which the intestate was ordered to pay the several sums of money mentioned in the award; but the award does not shew that Dickson, Clark and Street had any power or authority to do those acts. I incline to the opinion that each of the foregoing pleas, when considered in conjunction with the submission and the award, shews the want of authority in Dickson, Clark and Street to act for the plaintiffs as the award directs. If they had such authority, the intestate would not have compelled them to act. The award, therefore, appears to me to be neither reasonable nor mutual, and to be wholly void. I think the defendant is also entitled to judgment on the demurrer to the plaintiffs' replication to the defendant's 2nd plea, upon the same grounds.

MACAULAY, J., expressed his concurrence in the view taken by the Chief Justice.

*Per Cur.*—Judgment for plaintiffs on the demurrer.

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TERRIBERRY V. MILLER.

After two concurring verdicts in a case doubtful upon the evidence, and where there is good reason to be satisfied with the conclusion the jury have come to, the court will not grant a new trial.

Assumpsit by plaintiff, as bearer of a promissory note, against defendant as maker. At the last assizes for the Gore District the plaintiff had a verdict. The action had been pending a long time and was tried some years ago, when plaintiff also had a verdict, which was however set aside. One Fonger, a brother-in-law to the defendant, was a subscribing witness to the note. At that trial this witness was called. He would not positively acknowledge the attestation to be his, nor would he deny that it was, he



professed to be unable to say ; but he did admit that he had witnessed one note between these parties, and only one, which however he said was for a less sum. After hearing all the evidence produced, the jury on that trial found a verdict for the plaintiff, being satisfied that the defendant had made the note ; and with this verdict the learned judge who tried the cause was not dissatisfied. A new trial however was granted, and for this reason—the defendant denying that he had signed the note, and opposing the plaintiff's case upon that ground, desired to urge as a further defence that if the signature to the note was in fact his, he must have been imposed upon by a false representation of its contents ; and that the note was on that account fraudulent and void. It was doubted in banc. whether it was competent to him to advance such a defence after opening his case by denying his signature. But the court, upon argument of the case in term, were of opinion that it would be proper to grant a new trial, since it seemed to them, for reasons given in pronouncing their judgment, that a defendant ought under such circumstances to be allowed to submit this apparently double defence to the jury. It did not necessarily involve any inconsistency ; for the defendant, being conscious that he could never knowingly have signed a note for such an amount, may have been really doubtful in his own mind whether his name had been successfully forged, or whether a deception had been practised upon him in falsely reading the note to him, though he might have been clearly satisfied that one thing or the other had happened. A long time had elapsed since the new trial was ordered ; the delay was established in the argument to have arisen from the repeated ineffectual attempts to procure the attendance of Fonger, the subscribing witness. At the last trial the jury were without a very material witness, who had been examined on the first—namely, the late Mr. Durand, who swore that he had become possessed of this note before it came into the hands of the plaintiff ; and had gone to the defendant and demanded payment, upon which occasion the defendant took an exception to the note, but promised payment. To be deprived of the evidence of this



witness was a great prejudice to the plaintiff; but the jury, after hearing the case, and both defences being set up by the defendant—that is, denying the signature and proving facts in order to shew that if he did sign the note he could not have known it was for the sum stated in it, and must have been imposed upon by a false reading of the paper—again found for the plaintiff.

Against this verdict a motion for a new trial was made by *Ridout*, in Michaelmas Term; and in Hilary, *Draper* and *O'Reilly* shewed cause.

ROBINSON, C. J.—We are now asked to set aside the second verdict, because it is said there was no evidence to support it, or rather not sufficient evidence. But I cannot say the jury were not warranted in finding as they did. They are reported by the learned judge to have been an intelligent, respectable jury. The subscribing witness, it is true, did not prove the note, but it does not necessarily follow that if a subscribing witness should from forgetfulness, mistake or corruption, deny his signature, the party must lose the benefit of his security. More solemn and important instruments than a note have been established in contradiction to the testimony of the subscribing witness. The jury may find it just, under the circumstances, to look at the evidence. But here the denial of Fonger was not unequivocal; on the contrary, he would not say that he did not witness that note and see this defendant sign it, but he declared that if the signatures were genuine there was a fraud practised. The jury saw his manner and deportment while under examination: they heard that he was connected with the defendant: they probably knew his general character: they heard him admit that this defendant had signed a note in his presence, which was written by Mr. Desjardins, and was made payable to him, and was for a sum different from that expressed in the note. This note, he admitted, he had witnessed, and he would not say it was not the one produced. That he had witnessed only one he positively declared. Now the note in evidence was written by Mr. Desjardins; and as there was no suggestion that any mistake had been committed, the case seemed



brought to this issue—namely, whether Mr. Desjardins, who wrote the note and read it aloud, had committed a gross fraud. This Mr. Desjardins, now dead, was an individual well known in that community from where the jury came, and was probably long and intimately known to most of the jury: it need hardly be said that his character stood high for scrupulous integrity; and I cannot say that the jury have not judged rightly in deeming it more credible that Mr. Fonger's recollection of the contents of a note which he only heard read many years ago may be inaccurate, than that a man of known honest character should have committed an artful and deliberate fraud. Two juries have adopted this conclusion; it is not shewn that any new light can be thrown upon the matter; and the litigation, in my opinion, should end here, for by granting a new trial we must be supposed to have come to the determination that the plaintiff cannot be suffered to recover upon the evidence which he has given. I think the jury have formed their judgment conscientiously in a doubtful case, and that under the circumstances we ought not to overrule it. An affidavit has been made by the defendant, since moving for a new trial, and indeed after a lapse of two terms following the trial; but besides that it is merely his own account of the transaction, which could not be heard by a jury, it would be irregular to receive it at this time.

SHERWOOD, J. and MACAULAY, J., of the same opinion.

MACAULAY, J., had been against setting aside the first verdict, and his sentiments continued unchanged.

*Per Cur.*—Rule discharged.

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POWER ET AL. V. RUTTAN, ESQ., SHERIFF.

The court will not grant a new trial upon an objection to the jury having been summoned by a relation of either party, when the objection was known before the trial to the opposite party, and waived. After two verdicts in a doubtful case and upon a question of fraud, the court will not grant another trial, unless it is absolutely clear that the verdict was wrong.

A new trial had been granted on a former occasion in this case; and at the last assizes for the Newcastle District it was tried again, and the plaintiff obtained a verdict. The jury was returned by the coroner, who, as it appeared, was



a near relation of one of the plaintiffs ; it appeared however, that the objection was known to the defendant before the trial—notwithstanding which he made no objection to the jury being empanelled, and the defendant in other ways waived the objection. The real matter in dispute was, whether certain property, which had been seized and sold by the defendant under an execution, had been transferred *bona fide* to the plaintiffs, or whether the transfer was colorable only and fraudulent.

In Michaelmas Term last the *Solicitor General* obtained a rule nisi for a new trial. *Boswell* shewed cause.

*Per Curiam*.—We are of opinion that the rule for a new trial should be discharged. As respects the objection to the jury, because they were summoned by a coroner liable to be excepted against, from his relation to the plaintiff, it is clear we cannot interfere on that ground. The defendant's counsel and the defendant were aware of the objection before the jury were empanelled : they not only made no objection, but it appears from an affidavit filed that they deliberately waived it. The evidence certainly disclosed a suspicious case, but the circumstances of suspicion were fully investigated, and have been submitted to the consideration of a jury, after both parties were made aware from a former trial of the case what each would endeavour to establish. The question of fraud or no fraud is one which is peculiarly the province of the jury to deal with ; and in such cases, when there has been no suspicion, and when the jury have not been misdirected, their verdict should be conclusive, unless we can clearly see that the jury have come to an erroneous conclusion. We see no absolute impediment in law to the plaintiff recovering. The jury were charged in such a manner as to give to the defendant the full benefit of every consideration which the facts suggested in his favour. We have no reason to believe that any new light could be thrown on the case at a third trial ; and to set aside this second verdict, unless upon a strictly legal ground, would be in a manner usurping the province of a jury. If we were clear that their conclusion was wrong, we should not hold ourselves



disabled from sending the cause again to trial ; but in a doubtful case, especially one of this nature, there must be an end to litigation. The damages are apparently high, but two juries have given very nearly the same sum ; and it is sworn by the plaintiffs that they do not exceed the amount of their losses.

*Per Cur.*—Rule discharged.

### LOWES V. JARVIS, ESQ., SHERIFF.

In trespass against a sheriff for seizing goods in execution, it is not enough to call the bailiff who made the seizure, and prove by him that he had a warrant, without producing it, or giving some satisfactory account of it to excuse its non-production.

Trespass for taking the goods of the plaintiff. At the trial, at the last assizes for the Home District, a witness was called for the plaintiff, who stated that under a warrant, which was not produced nor its absence sufficiently accounted for, he had seized the goods in question. No privity between him and the sheriff was otherwise shewn than by this verbal account of a warrant. It did not appear upon what process any warrant issued, nor in fact that any process had come to the sheriff, or had been sued out in the suit which the bailiff spoke off. The defendant's counsel objected to the proof as insufficient ; but the jury found for the plaintiff, with 30*l.* damages.

*Gamble*, for defendant, obtained a rule nisi to set aside this verdict, as not sustained by the evidence. *Sullivan* shewed cause.

The Court were of opinion, with the learned judge who tried this cause, that the connexion between the sheriff and the bailiff was not sufficiently established to make the sheriff responsible for the alleged trespass ; and they made the rule absolute without costs.

*Per Cur.*—Rule absolute without costs.

### TRUSCOTT ET AL. V. LAGOURGE.

A promissory note made payable at a particular place, must be presented for payment at that place on the day on which it falls due, or the holder cannot recover.



Assumpsit on a promissory note, made payable at the bank of Messrs. Truscott and Green ninety days after date. The defendant was sued as endorser. The only proof of presentment at the bank was that the note, which fell due on the 15th April, had been lying some time at the bank of Truscott and Green, who had discounted it through their agent at Brantford. This agent, being responsible by the terms of his agency for all notes discounted by him, had taken the note from the bank on the 11th August, (the day before it fell due), in order to procure payment if possible. It was proved that there were no funds of the defendant in the bank on the 15th April. The plaintiffs obtained a verdict, subject to the opinion of the court whether the presentment at the bank, averred in the declaration, was sufficiently proved.

——— for plaintiff. *Gamble* for defendant.

*Per Cur.*—We are all of opinion that the verdict must be set aside. It is clear that proof of the presentment at the bank was necessary; it is equally clear that no one did in fact present the note there on or after the day when it fell due. If the bank has actually held the note at maturity, the proof of there being no funds in their hands would be sufficient. Non-payment at the bank on the 14th, when the note was taken from the bank, is immaterial.—1 Esp. N. P. C. 262. When the agent of Messrs. Truscott and Green took the note away from the bank it was charged to him in account; and it seems that he, rather than the bank, was from that time the actual holder of the note; but at all events the note cannot possibly be held to have been presented at the bank, when it was neither taken there by any person nor lying there for payment.

*Per Cur.*—Rule to set aside the verdict absolute.

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#### WATSON V. FOTHERGILL.

Where a verdict has been taken by consent for plaintiff, subject to a reference, the court will not, on account of a failure in the arbitrators to make an award, allow judgment to be entered for the verdict, though such failure be imputed to the defendant.

This case had been referred at *Nisi Prius*, and a verdict taken for plaintiff by consent. No award was made; and



*Spragge* for plaintiff, obtained a rule on the defendant to shew cause why he should not be allowed to enter up judgment on the verdict on account of the failure of the arbitrators to make an award being imputable to the defendant, which was supported by affidavits. The *Solicitor General* shewed cause upon affidavits repelling the allegation against defendant; and also because the rule of reference was not made a rule of court.

*Per Cur.*—The reference had not been made a rule of court, and we have therefore no jurisdiction over the matter. The affidavits on the part of defendant repel the assertion that the failure of the reference was to be attributed to defendant, so that the grounds of the application fail. And at any rate, it does not appear that the courts in any such case have gone further than to make an order that judgment shall be entered unless defendant will submit to another reference on reasonable terms.

Rule discharged.

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#### HALL V. GRISWOLD.

The court set aside an assessment of damages, where the record was not entered till the morning of the second day of the assizes; there being no assent on the part of the defendant.

Damages were assessed in this case at the last assizes for the Home District. The record was not entered on the first day, and it became a question with the learned judge whether he could properly receive it on the second day at the instance of the plaintiff, there being no one on the part of the defendant to assent or object.

*Per Cur.*—The rule of court is peremptory as to issues—that they shall be entered the first day; and this has been observed by the judges, perhaps not inflexibly but strictly; so that causes are not allowed to be entered after the first day without the consent of the defendant, and without some sufficient reason being shewn why they were not entered in time. With respect to default cases, we think that they should be governed by the same rule, for our statute 2 Geo. IV., ch. 1, sec. 29, enacts “that in all such cases the



damages shall be ascertained *at the same time and in like manner* as if the parties had pleaded to issue." This seems to put them on the same footing as to questions of this kind, and it is reasonable that they should be so. As the damages were assessed subject to the confirmation of the court, and as we think such a laxity of practice in this respect which such a precedent might introduce is not to be encouraged, the assessment of damages must be set aside.

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#### NORTON, ADMINISTRATOR, v. POST.

A foreign judgment is not proved by a certificate of the clerk of the court that judgment had been rendered in the suit for such a sum in favor of the plaintiff.

This was an action on a foreign judgment, alleged to have been rendered in a court in Vermont. The only evidence given of the judgment was a certificate of the clerk of the court that on such day judgment had been rendered in the suit, &c., for the sum of, &c. There was no exemplification or sworn copy of a record, no original minute of a judgment, nor any evidence that it was not the ordinary course to enter judgment on a roll. The learned judge at the trial reserved for the consideration of the court, whether the verdict taken could be sustained on the evidence.

*Bidwell* argued for the plaintiff. *Sherwood, H.*, for the defendant.

*Per Cur.*—It is impossible to admit this certificate as evidence of a foreign judgment. The verdict must be set aside and a non-suit entered.

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#### EXECUTORS OF TIFFANY V. BULLEN.

Papers are not regularly served by being delivered to the clerk of the attorney, at a distance from the attorney's residence, when the clerk is casually at the place of service.

In this case the plaintiffs had obtained a rule nisi for referring to the master to compute principal and interest, and to tax costs on the note declared upon in this action; judgment having gone by default. The defendant shewed for



cause that he had demanded particulars under a judge's order, and that the plaintiffs had nevertheless proceeded without noticing this demand, and had signed judgment. The plaintiffs' attorney, on the other hand, shewed that after he had declared, he had conversed with the defendant's attorney, and told him that the only demand was a note of 500*l.*, which was declared on, and that he would wait for the plea to suit the convenience of the defendant's attorney, provided that the latter would dispense with the regular notice of trial; that notwithstanding this agreement, and although the defendant's attorney well knew that the only demand was upon the note, he served a demand of particulars on a clerk of plaintiffs' attorney, who happened to be in Toronto, (the attorney himself residing in Hamilton,) of which the attorney was informed by his clerk; but the issue was then so near that the plaintiffs' attorney was unwilling to recognize the service unless compelled.

*Per Cur.*—We have formerly held that a service upon an attorney's clerk to be sufficient should be in his master's office, or at least in the same place, and while he is engaged in his master's service. Here it was at a place fifty miles distant, while the clerk was absent on a visit; and it would be unsafe to subject suitors to the chance of papers so served being brought regularly and in time to the knowledge of the attorney. The attorney, it is true, was opposed to the service, but he refused to recognize it, and we think he had a right to do so: he knew, to be sure, that it had been served, but not regularly served.

*Tiffany* for plaintiff. *Spragge* for defendant.

*Per. Cur.*—Rule to compute absolute.

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#### TRUSCOTT ET AL. v. GOLDIE ET AL.

Where defendants filed a sham demurrer, which was argued before a judge at chambers, as a dilatory plea—*Held* that the defendants were still entitled to short notice of trial, although there was not sufficient time to give it before the next assizes, owing to the delay occasioned by the demurrer.

The declaration in this case was in assumpsit on the common counts. The defendant filed a general demurrer, and as it was evident the demurrer could only have been



intended to throw the cause over the assizes, the plaintiffs applied to a judge in vacation, under the 37th sec. of the statute 2 Geo. IV., ch. 1, and obtained an appointment to argue the plea, treating it as a dilatory plea, and procured an order of the judge for taking it off the file. This took place just before the assizes; another plea was pleaded, and there being no time for giving notice of trial, the plaintiff, on the second day of the assizes, served the defendants with a notice that the record was entered, and proceeding to try the cause, obtained a verdict.

*Spragge* for defendant, moved to set aside this verdict for irregularity, as no notice of trial had been given. *Tiffany* shewed cause.

ROBINSON, C. J.—I am quite sure the legislature intended their provision to extend to demurrers—more especially to general demurrers. They certainly do not come within the term dilatory pleas, though in point of fact they may be and frequently are filed for no other purpose than to gain time. The legislature seems to have used the term “dilatory plea” without attending to its proper signification, as appears from their expression—“in case such plea shall be of a matter of law and not of fact;” and I believe that it has been held in several cases that demurrers evidently frivolous may be disposed of under this provision of the statute. As to the question raised here with regard to notice, it must have been intended by the act to dispense with the regular notice of trial; for otherwise the provision “that the defendant shall be bound to go to trial at such time as he would have been bound to go to trial in case he had pleaded an issuable plea in the first instance, and not such dilatory plea,” would be nugatory and unmeaning. It may therefore allow of a short notice of trial; but here no notice was in fact given until after the assizes had commenced; and as it is necessary the defendant should know before the assizes begin whether the plaintiff intends to try the cause, we are of opinion that this verdict must be set aside on the ground moved.

*Per Cur.*—Rule absolute.



## ARNOLD v. FISH.

If a defendant lie by and allow plaintiff to take several steps, he thereby waives previous irregularities in the proceedings; he should have taken the earliest opportunity of excepting to them. And if he move a judge in chambers, he must state all the irregularities he relies on, and cannot afterwards in term resort to other irregularities, which existed at the time of the application to the judge but were not then objected to.

The defendant's attorney in this case had been before a judge in chambers, and obtained a summons for setting aside the service of the process and all subsequent proceedings, for irregularity, on these grounds:—1st, because the process had not been served by a sheriff or his officers, as the statute requires; and 2nd, because the notice on the back of the copy of the process served was misdirected, the defendant's name being written "Tish," instead of Fish. The learned judge discharged the application, conceiving that for such irregularities as were objected here, the defendant should have moved more promptly and not lain by until the plaintiff had declared and taken subsequent steps—for in fact interlocutory judgment had been signed. *King*, this term moved the court, arguing that as a term had not intervened since the irregularities complained of, it could not be considered too late; and he urged, as a new exception to the plaintiff's proceeding, that he had not served the defendant with a notice of declaration being filed. *Draper* shewed cause.

*Per Cur.*—If there were no objections to this motion on the ground of its coming too late, we should still not set aside the proceedings on the objections which have been raised. As to the process not being served by the sheriff or his officers, it appears clearly in the affidavits before us that the defendant waived any exception on that score, by recognizing the service. With respect to the alleged misnomer in the notice, which is nothing more than the omission to cross the letter (T), it would be a slender ground indeed to proceed upon. If we were to give way to such an objection, we must treat every case as a misnomer where a "T" has not been crossed or an "I" dotted. It is evident here what was intended; the defendant could not be misled; his name was properly written in the body of the writ, and the notice is directed to *the within defendant*



As to the notice of declaration filed not being served, that may be necessary when the plaintiff is only bound to file a declaration and not to serve it; but when he serves a copy, as was necessarily done here, no better notice can be given of declaration filed; but whatever there might be in this exception, the defendant cannot be allowed to raise it now, because when he moved the judge in chambers on the ground of irregularity, he was bound then to point out all the irregularities he complained of. He expressed no desire before the judge at chambers to be relieved on the merits, which course the judge suggested was open to him.

Rule discharged.

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#### CROOKS V. DAVIS ET AL.

It is no objection to a declaration served, that the attorney's name is not signed to it. Service on the agent in the cause, though not the general agent, is good.

*Spragge* obtained a rule nisi for setting aside proceedings in this cause, because after plaintiff had been allowed to amend his declaration he had served the amended copy on an attorney, as agent for the defendant's attorney, though he was not in fact his booked agent, and because to this copy of the declaration the name of the plaintiff's attorney was not subscribed. *Ridout* shewed cause.

The Court discharged the rule, it appearing that the attorney on whom the service was made was in fact agent in this cause; and they considered the absence of the signature of the plaintiff's attorney no objection, his name appearing in the commencement of the declaration as usual, and the name subscribed being no part of the declaration.

*Per Cur.*—Rule discharged.

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#### FISHER ET AL. V. EDGAR.

Defendant gave a cognovit with leave to issue execution; at the foot was a memorandum signed by plaintiff, deferring payment of part of the debt to a day subsequent to that fixed for the issuing execution. The plaintiff issued a *fi. fa.* for the whole on the first day; and the court made absolute a rule for restraining the levy according to the terms of the memorandum, with costs.



In this cause the defendant had executed a cognovit, with leave to issue execution for the debt on a given day; at the foot of which was written a memorandum, signed by the plaintiff, stating that the execution might be taken out on a day named for 100*l.*, part of the debt, and for the remainder on a subsequent day. The day first mentioned having passed, the plaintiffs took off this memorandum from the cognovit and entered judgment, and took out execution for the whole.

*Draper* moved to restrain the levy to 100*l.*; and upon cause being shewn by *Washburn* for the plaintiffs, the Court made the rule absolute and granted the costs of the application.

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SAXON AND McKNIGHT v. McFARLANE ET AL.

In assumpsit to recover a promissory note, the declaration contained the common money counts only. Judgment having gone by default, the plaintiffs on assessing damages, proved that a copy of the note was attached to the declaration filed and to the copy sent to the sheriff to be served, without proving defendants' signature: *Held* sufficient.

Assumpsit. The declaration was on the common money counts. Judgment by default was obtained, and at the assessment of damages the plaintiffs produced a promissory note, expecting to recover upon it, though not declared on, and without proof of defendants' signature, on giving evidence *vive voce* that a copy of the note was attached to the declaration filed in the crown office, and a copy also annexed to the copy of declaration sent to the sheriff to be served. The question was whether this evidence entitled the plaintiffs to recover under our statute 5 Wm. IV., ch. 1.

ROBINSON, C. J., was of opinion that as the intention of the legislature was to save costs and to simplify proceedings in actions of this nature, the court should, for the sake of the parties, carry the act into effect liberally, and without any unnecessary strictness in applying the rules of evidence. He considered that evidence of the copy of the note being attached did not require to be given with the same strictness as if it were proof of the contract or other cause of action.



He held it to be clear that the 4th and 10th clauses required it to be shewn that a copy of the note was annexed to the copy of the declaration served as well as to the declaration filed ; but that these, being requisitions of the statute, were sufficiently complied with by *viva voce* testimony being given that a copy of the note was annexed to the declaration filed, and also to the copy of the declaration *when sent out* to be served.

SHERWOOD, J. and MACAULAY, J., agreed that the plaintiffs might in this case recover on the evidence given.

*Per Cur.*—Postea to the plaintiffs.

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### BARNES V. McMARTIN.

The court will not grant an attachment for non-payment of money pursuant to an award, which has been demanded under a power of attorney, unless the affidavit of demand shew that it has been made after the time appointed for paying the money.

The plaintiff in this case had obtained a rule nisi for an attachment for non-performance of an award to pay a sum of money at a certain day and place. The affidavit on which the rule was obtained stated that A. B. under a power of attorney, of which a copy was annexed, demanded the money, but it was not said on what day he made the demand, nor that it was after the day mentioned in the award.

ROBINSON, C. J.—I think we ought not to grant any attachment on this affidavit. It is very true that the letter of attorney bears date after the day when the money was demandable, and that the affidavit states a demand of less than the whole sum, from which we may infer that part had been before paid ; but in my opinion we should not be left to collect so material a fact from circumstances and inferences and references to the date of other papers. An attachment is a summary proceeding and the failure which warrants it should be distinctly and directly set forth on oath—the affidavit should be sufficient on the face of it. Suppose by possibility the truth should be, that a demand was never made after the day set ; it would be strange that the person attached should not have it in his power to expose



the falsity of the statement, but how could he disprove an averment of this material fact, made in so uncertain a form? And if it should be the case that a demand was made too soon, there could be no assignment of perjury, although the demand would be a mere nullity, for no time is mentioned in the affidavit. The rule, I think, should be discharged. In all pleadings, civil and criminal, statements of indispensable facts must be made, with time and place; and an affidavit to ground an attachment should not be less certain.

SHERWOOD, J. and MACAULAY, J., agreed.

*Per Cur.*—Rule discharged.

#### DOE EX DEM. FISHER V. CHESSER ET AL.

The purchaser of lands at a sheriff's sale under a judgment and execution, is entitled to recover in ejectment against the debtor, in his legal representation in possession, without proof of the title of such debtor.

John Chesser the elder died in possession of one undivided moiety of the premises mentioned in the declaration in this case—Nos. 9 and 10, in the 4th concession of the township of Plantagenet, in the Ottawa District; and after his decease an action was brought against his administrator by the lessor of the plaintiff: judgment was recovered; and after *fi. fa.* against goods a *fi. fa.* against his lands issued, upon which the premises in question were sold by the sheriff and bought by the lessor of the plaintiff. At the time of the sale one Thomas Lee, Joseph LeQuie, John Chesser, the eldest son and heir-at-law of John Chesser deceased, jointly held possession of the premises. They are the defendants in this action. The case was tried at the last assizes for the Eastern District, before Sherwood, J., and the plaintiff obtained a verdict, subject by consent of both parties to certain points reserved for the consideration of this court. The lessor of the plaintiff proved his judgment against the administrator, deceased, the *fi. fa.* against the goods, the *fi. fa.* against the lands, the sale and deed of the sheriff to him, and the possession of John Chesser at the time of his death, and there rested his case. The defendants



then adduced evidence to shew that John Chesser the deceased had no estate whatever in the premises at the time of his death, the legal estate then being in one Joseph Fortune, who afterwards, and before the judgment in favor of the lessor of the plaintiff, sold the premises to one Thomas Mears, who afterwards sold and conveyed them to one Alfred Chesser. Certain legal objections were taken to the defendant's testimony, which form the reserved points. It was urged at the trial, and afterwards the objection was renewed in banc., that the evidence given by the defendants for the purpose of proving the legal estate in a stranger was improperly admitted at the trial. It was alleged that if the judgment had been recovered against John Chesser and the sale had occurred in his lifetime, and the action had been brought against him, no such testimony would have been admissible; and that the same rule of evidence is applicable to the heir-at-law and to the other defendants, his co-tenants.

The case was argued in Hilary Term, by *Draper* for plaintiff, and *Bogert* for defendant.

ROBINSON, C. J.—Upon the report of this case made by the learned judge who presided at the trial, I am of opinion that we ought not to enter upon the consideration of any of the legal objections raised to the title of the deceased John Chesser. He died in possession of the land for which this ejectment is brought. This defendant Chesser is heir-at-law of his late father. It seems however that the father possessed the premises as tenant in common with one Hager, and of course no greater interest can be considered to have devolved on his son, one of these defendants, as his heir. At the trial, the defendants took legal exceptions to the title of Chesser deceased, which was rested on the footing of disseisin. The grantee of the<sup>re</sup> Crown was William Fortune; and it was contended that his title, or rather that the title of his heir Joseph Fortune, had not been divested by the wrongful entry of John Chesser; and several points were relied on for establishing that Chesser could not have acquired a title by disseisin. The defendants then shewed that one Alfred Chesser had acquired



by purchase the title of Joseph Fortune, and this title was set up to defeat that of the lessor of the plaintiff.

I will not say anything now that may have the effect of prejudicing—so far as my opinion may be required—the case which these defendants or any of them may choose hereafter to advance as plaintiffs in ejectment. But there is a consideration which, it appears to me, the court is not at liberty to pass by, and which makes it necessary, I think, to avoid entering at present either into the exceptions which have been taken to the plaintiff's title or to the title of Alfred Chesser which the defendants have set up. It is a well established principle that the purchaser under a judgment and execution is under no necessity of proving title in the debtor, if he is driven to an ejectment to gain possession of the property from him. His title is to be presumed, and he is not at liberty to set up title in another. If this judgment and execution had been against the elder Chesser in his lifetime, he could not have put the purchaser at sheriff's sale to proof of title in him (Chesser). The action is against the legal representatives of Chesser, under a judgment against whom real estate is permitted by our law to be sold; and the execution is against the real estate of Chesser the elder, of whom the defendant Chesser is both heir and administrator. Succeeding his ancestor in the possession, he is to be taken as claiming under him; and, as his privy in blood, is equally estopped from denying the title of Chesser the debtor, whose estate it is in the proceedings assumed to be from the fact of his having died seized. It is true that two other persons defend with Chesser the younger; but it was not shewn that they hold under a title distinct from him; and it is not to be presumed that they do. Under the facts, I am of opinion that the lessor of the plaintiff was entitled to a verdict upon proving the judgment, execution, sale, sheriff's deed, and the dying seized of Chesser the elder, and the succession of his son to the estate. The principle which raises the presumption of title in his favor upon proof of these facts is one which I think it very important to maintain in full force; for otherwise persons who may have contracted



debts on the credit of the property of which they were the apparent owners would be in a better situation if they could shew an imperfection in their title than if they had in fact the legal estate which they were supposed to have. We see so many contrivances and attempts on the part of judgment debtors to defeat the remedy of their creditors, that we ought above all things to be careful to afford no facility by suffering a relaxation from the rule referred to, which is founded on sound principles. If Alfred Chesser has a title, he can advance it in an ejectment; but as the case stands, the plaintiff, I think, should be allowed to enter judgment on the verdict given for him at the trial.

SHERWOOD, J.—When the debtor himself is in possession of the land, claiming to be the owner, and is made defendant in an action of ejectment by the creditor, he ought not to be allowed to shew a defect in his own title for the purpose of defeating the action. For instance, if he holds the land as grantee of a married woman, who never acknowledged the execution of the deed according to law; or if he holds under a will attested by only one witness; he ought not to prevail in the action on the ground of the proving the legal estate in a stranger; because his title may never be disputed, and was originally intended as a good and valid title. The debtor, however, would not be precluded from proving as a defence to the action that he held merely as tenant at will or at sufferance, or as the servant or agent of the legal owner. If his heir-at-law were found in possession and was made defendant, he might prove, I think, that he never claimed the land as heir-at-law, but held the possession for the legal owner as his servant or agent, or as his tenant. This possession would be presumptive evidence of his ownership, it is true, but nothing more; and he might still shew the real truth and justice of the case by proving such facts as would altogether remove the presumption of title, and consequently establish a legal defence to the action by shewing the property to be in another. If he were not allowed to make this defence, his case would be anomalous, and much hardship and injustice might follow by a change of possession.



It is a general rule of evidence that the defendant may shew the title to be in a third person, and a tenant may prove that his landlord's title has expired, or that he has granted the reversion to another; and I can see no reason why the heir-at-law should not be allowed to shew that he never claimed the premises as heir, although he happened to have the possession. The present case, however, appears to be still stronger in favor of the principle of shewing the title in a third person than any one to which I have alluded. John Chesser is sued as joint tenant of the premises in question with the other two defendants. Now, because he is heir-at-law, should the defendants be deprived of a right which they would undoubtedly possess if they were not sued with him? If the other two were sued together, they might prove the legal estate in another and not in the lessor of the plaintiff, and this would be a good defence. Why should they be in a worse situation when sued with the heir-at-law? I think it must be presumed, from the manner in which this action is brought, that John Chesser was not sued as heir-at-law, because he could not hold a joint title in that character; and if he were not sued as heir-at-law in possession, but as a joint tenant with others, his character at law should not be urged against him, especially as the interests of others are involved. I think he is not precluded, even as heir-at-law, from shewing he never claimed any estate in the premises in that character.

Both my brothers being of a different opinion from myself in this case, I think it very probable I may be found in error, on further consideration of the subject; but my present impression is in favor of allowing the defendants the right which was conceded to them at the trial. I still think they ought not to be precluded from shewing that the legal estate was never in John Chesser the debtor, but was in a third person at the time of his death, and consequently that the heir-at-law took nothing by descent. My opinion therefore is, that the judgment of the court should be expressed on the points reserved at the trial of this case.

MACAULAY, J.—I think the plaintiff entitled to recover on the following grounds: John Chesser, the heir-at-law



and administrator, and sole defendant in the judgment obtained by the plaintiff, is one of three defendants. Neither Mears nor Alfred Chessy defend as landlords, or appear to be possessed beyond a moiety; and it is not shewn that the defendants or any of them are their tenants; and if presumption was resorted to, it ought to be presumed that John Chessy possessed the moiety held by his father, and the other defendants the whole or portions of the residue; for the whole estate is claimed in this action, and not merely a moiety. It appears that John Chessy the defendant lived with his father on these premises, as did also Alfred; that he was residing thereon at the father's death, and continued afterwards so to reside. Then, if Chessy were still living, and this action was against him, he could not resist it by disclaiming all title and proving the legal estate to be in others. The judgment, execution, and sale of land of which he was possessed ostensibly in fee, would constitute a quasi tenancy between him and the sheriff's vendee, so that he could not renounce any right he had previously asserted, however he might shew that he never possessed or claimed anything beyond a bare holding at sufferance: any greater interest might be sold, and the defendant could not gainsay his former pretensions to the injury of his creditor, who could merely sell what he owned without prejudice to the title or rights of strangers. This rule was adopted in this court in the case of Doe ex dem. Armour v. McEwen.

The defendant Chessy having continued to hold after his father's death, apparently as a descended estate, cannot, in the absence of proof of holding in any other spirit or capacity, controvert the father's right, any more than he himself could, if living. Where a term had been granted to defendant's father, on whose death intestate a brother of defendant entered and took administration and was possessed till his death, when defendant entered, and afterwards, by indenture between him and another, concerning other premises, it was recited that he was the legal personal representative of his brother, it was held *prima facie* evidence that the term was vested in him. Lord Ellenborough



said, that being in possession the law would refer it to a rightful rather than a wrongful title. Bayley, J., said, if his possession was referable to some other title, it was for him to shew it.—6 M. & S. 110. Where A. had been tenant of certain premises, and upon his leaving them B. took possession, it was held that in the absence of any evidence to the contrary it might be presumed that he came in as assignee of A., though he never paid rent.—6 B. & C. 41.

Any difficulty touching the other defendants seems equally obviated. Chesser died possessed of a moiety, and if the defendants now hold any part thereof, they must have come in since; and they do not shew how, when or under whom they obtained it.

If at the time of the judgment the *elegit* debtor is entitled to the whole property claimed in the ejectment by the *elegit* creditor, other persons, who are in possession with the *elegit* debtor when the ejectment is brought, must prove their title; and if they do not the *elegit* creditor is entitled to judgment against all.—2 C. & J. 71. The judgment upon an *elegit* is *prima facie* evidence of the debtor's title to the lands therein comprised, even against those persons not in privity with him.—2 Hud. & Bro. 199. I consider the creditor's rights at the death of Chesser equivalent to those of the judgment creditor in the case first above mentioned; and if not, at least so when judgment was recovered against this defendant Chesser, after which, for aught we know, the other defendants may have entered. And I consider the sheriff's sale and deed under the judgment and execution equivalent to the judgment, and the *elegit* in the last mentioned case as presumptive evidence, especially when proof of long possession by the debtor ostensibly in fee is superadded. The plaintiff is not driven to go into his title further, and the defendants have not shewn themselves to hold under circumstances entitling them to impeach it, or to controvert with the present plaintiff (a creditor) the right of Chesser deceased (his debtor) as between Chesser and strangers in the title to all parties, so far as is shewn.

*Per Cur.* (diss. Sherwood, J.)—Postea to the plaintiff.



## STEWART V. RENNIE.

*Held per Cur.*, that no action would lie on the agreement (given below)—1st, from the want of consideration; 2ndly, because the contract was usurious on the face of it.

Assumpsit. The defendant, on the 12th March 1835, gave his promissory note to the plaintiff for 265*l.* payable in twelve months, and immediately after gave him the following letter in addition to the note :—

“Toronto, 12th March, 1835.

“Captain Hugh Stewart,

“Sir,—I have this day received from you the sum of two hundred and sixty-five pounds, currency, and for which sum I have given my promissory note to you payable in twelve months from this date, the original sum being 250*l.*, and six per cent. interest makes up the amount to 265*l.*; and notwithstanding that you have accepted of my promissory note at the above date, it is perfectly understood between us that should you require the money before the expiry of the said period, I shall instantly repay the whole amount.”

(Signed) “RICHARD RENNIE.”

The plaintiff brought his action on this agreement before the note became due. At the trial it was objected that the agreement was void—1st, for want of consideration; 2nd, for being usurious on the face of it. The jury found for the defendant.

*Gamble* obtained a rule nisi for a new trial. *Sherwood, H.*, shewed cause.

ROBINSON, C. J., thought the usury was evident on the face of the instrument; and that if it were not, it rested with the jury to find it: that being usurious, the plaintiff could not repudiate the usurious agreement and sue for the principal, though a promise made afterwards by the defendant to pay the money would be binding: that a demand—namely, that the plaintiff “required it”—should have been shewn: for which reasons he considered the verdict for defendant was proper.

SHERWOOD, J.—A valid or sufficient consideration or recompence for making, or motion or inducement to make, the promise upon which the party is charged, is of the very essence of every contract not under seal, and must exist although the contract be reduced into writing, otherwise



the promise is void, and no action can be maintained upon it. The legal maxim is *ex nudo pacto non oritur actio*. Upon promissory notes and bills of exchange the consideration is presumed in law, but upon a contract like the present, the consideration must be proved by the instrument itself. Here I think no consideration whatever appears. There is no benefit resulting to the defendant, or to any third person at his request. There is no inconvenience to the plaintiff proved by the letter, because it is quite uncertain whether the plaintiff would desire payment for want of the money or for any other cause. If the contract however were valid, this action could not be sustained, because there was no proof of any demand of the money.

With respect to the second objection, that the contract is usurious on the face of it: If the defendant intended to promise a payment of 265*l.*, there can be no doubt the contract was usurious. To constitute usury there must be an existing debt or a loan, and an agreement to pay more than legal interest for the forbearance of the debt or loan. Now here was a loan of money for twelve months, and a promissory note was taken for the full amount of principal and interest payable at the end of that period. The only question then is, did the defendant by his letter promise to pay the 265*l.* or the 250*l.* when required by the plaintiff. The fair conclusion appears to be that he promised to pay the whole amount of the principal and interest—namely, 265*l.* That being the case, the contract is wholly void under 12 Anne ch. 16, so that on both the objections the plaintiff fails, I think, to sustain this action. If I felt a doubt of the meaning of the parties as expressed in the letter, I would have no objection to sending the case to another jury, for the purpose of submitting the question of intention to them; but I cannot say I have any doubt.

MACAULAY, J., agreed.

*Per Cur.*—Rule discharged.

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## McINTYRE V. SUTHERLAND ET AL.

In a joint action against two, one was held to bail and afterwards absconded. Judgment being entered, it was held that the plaintiff might issue a *ca. sa.* against both defendants, so as to charge the bail of the one who had been arrested, but not using it against the other without a new affidavit against him, as required by the statute.

In this case the plaintiff had arrested one of the defendants and served the other with non-bailable process. He obtained judgment against both, but the one he had arrested having absconded after giving bail, he was desirous of proceeding against the bail, but met with difficulty on account of not being able to take out a *ca. sa.* against one only of the two defendants, nor to obtain it against both for want of an affidavit against the defendant who had not been held to bail. This difficulty could not be removed, because the plaintiff could not conscientiously make such an affidavit with regard to the other defendant as the law required.

*Taylor*, for plaintiff, moved the court for leave to enter a suggestion on the judgment roll of the above facts, as a ground for the court to award a *ca. sa.* against one defendant only, in order that he might charge the bail, and a *fi. fa.* against the other defendant; but

The Court thought they would be complying with the spirit of the act 2 Geo. IV. ch. 1, sec. 15, and would be more clearly within the law, by holding any such suggestion to be unnecessary, and allowing a *ca. sa.* to issue against both, with an intimation that it could only be executed upon that defendant who had been before arrested; and that if the other were to be arrested under it the court must of course discharge him. The words of the statute are, "that in all cases in which the party has been held to special bail, it shall not be necessary to make or file any other affidavit before suing out a *ca. sa.* upon the judgment obtained in the same action." The plaintiff therefore, having held one of these defendants to bail, has a right to his writ of *ca. sa.* against him, and the statute says he may have his *ca. sa.* upon the judgment; but, to be consistent with the judgment, the *ca. sa.* must include both the defen-



dants, otherwise it would be irregular, so far at least as form goes; therefore we think the plaintiff may have his writ on the judgment. As against one of the defendants this will be regular, and enable him to charge the bail. The court directed the writ to be issued accordingly.

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### STEELE V. LAMEUX.

The sheriff's warrant to a bailiff to arrest must be endorsed with the amount of the debt claimed and costs, in like manner as the writ is required to be.

The defendant had been arrested on mesne process, and the warrant to the bailiff who made the arrest did not state the amount of the debt claimed and the costs, as directed by the rule of court of Trinity Term, 3 and 4 Wm. IV.

*Baldwin* moved in this term to set aside the arrest for this reason. *Draper* shewed cause.

*Per Cur.*—The rule of court expressly directs "that upon everyailable writ *and warrant* the amount of the debt, &c., shall be stated," meaning certainly the sheriff's warrant to the officer making the arrest. The proper endorsement being on the writ, which remains in the sheriff's office, is of no service to the debtor. It is necessary that the sheriff, possessing the information, should also place his officer in possession of it, in order that the debtor, when arrested, may know the extent of the claim made upon him.

Rule absolute.

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### THE KING V. RUTTAN, SHERIFF.

Where an attachment against a sheriff has been set aside for irregularity, with costs, the court delayed issuing another attachment, to give time for the payment of these costs.

The court had ordered an attachment against the defendant for not returning a writ of *feri facias*, which attachment was afterwards set aside with costs on motion of the sheriff's counsel, because the rule to return the writ had neither been served on himself nor his deputy, but on a person who was only a bailiff. And now, *Taylor* moved on behalf of the plaintiff in the original cause for another



attachment; and on its being shewn to the court that the costs of setting aside the irregular attachment had not yet been paid, the court (Macaulay, J., *hesitante*) did not grant this attachment as usual, but ordered that it might issue at the expiration of a week, provided the plaintiff in the mean time paid the costs of setting aside the former irregular attachment.

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McMARTIN V. TRAVELLER.

In a particularly hard case, the court will relieve an executor who has omitted to plead "*plene administravit*," by granting a new trial and amending his pleadings, on payment of costs.

Defendant was sued as executor *de son tort*. He omitted to plead *plene administravit*. At the trial he was expressly found to have converted only some small article of the value of 6s. 3d. The learned judge holding that he was nevertheless liable beyond the amount of assets, as he had not pleaded want of assets, a verdict was rendered for plaintiff and 179l. damages. .

ROBINSON, C. J.—Upon the facts appearing, I think in an extreme case of this kind, and to prevent the possible ruin of the defendant by a step of his attorney, that we may properly grant a new trial on payment of costs, with leave to defendant to amend his pleading. In *Robinson v. Bell* (2 Chit. 57; 2 Vern. 147), it seems equity has relieved in hard cases of this description, where the plea of *plene administravit* was omitted; and to prevent great hardship, I am in favor of this court extending its equitable power of relief in this case by granting a new trial and leave to amend. I think it is competent to this court to do this: the case calls for it; the sum is large; the defendant apparently in a humble station; and it is just under the circumstances to grant relief. Afterwards a new trial was ordered by the court, unless the defendant consented to restrict the judgment to assets of the estate in defendant's hands, undertaking not to suggest a *devastavit*.



## KING'S BENCH.

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 TRINITY TERM, 6 WILLIAM IV.
 

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## DUNN V. McDOUGALL.

Case will lie for maliciously holding a man to bail on the affidavit that "he was apprehensive the said A. B. would leave the province," &c., if strong ground be shewn negating the existence of any such apprehension.

Case for a malicious arrest. The defendant in this suit had arrested the present plaintiff for a debt of 150*l*. The justice of the demand was not disputed, but the ground of the action was that the arrest was malicious, being unnecessary and vexatious in this particular—namely, that the defendant, when he made his affidavit of debt, could not under the circumstances have entertained, and did not entertain, the apprehension therein expressed, that the plaintiff Dunn "would leave this province without paying his debts." It was objected at the trial that an action could not be sustained on that ground; but Macaulay, J., who tried the cause, held otherwise; and after evidence given on both sides to the jury, proving or disproving the reality of the apprehension expressed in the affidavit, the jury were directed that it was incumbent on the plaintiff to shew a want of probable cause, from which malice might be inferred; and that the question was for them to decide. They found for the plaintiff 10*l*. In Easter Term, *Draper* obtained a rule to shew cause why the verdict should not be set aside, as against law and evidence. *Baldwin* shewed cause.

ROBINSON, C. J.—The main objection has been renewed here—namely, that an action cannot be maintained upon the mere ground that the defendant entertained no such apprehension as he declared in his affidavit, the debt sworn to being admitted to be due. Upon this general question my opinion is against the defendant. I think an action for such a cause may be sustained, provided the evidence satisfactorily establishes the ground relied on.

The leading principle of law, that there is no wrong



without a remedy, is, to be sure, not enforced literally and to the full extent. To bring a groundless action does certainly occasion a loss to the person sued, although he may not have been held to bail; but yet it seems very clear that no action will lie for him to recover damages. According to general principles, an action should lie in such a case where malice can be proved; but the courts have always discountenanced it, because of the multitude of such actions which might be brought. A verdict for the defendant would probably in very many instances, if not generally—such is the spirit of litigation—be followed by an action of this kind against the plaintiff, and the cause of action must be tried twice. Again, persons must not be discouraged from asserting their rights, and the costs to which they are liable on failure are a considerable check. It would, besides, be in general a difficult question to settle whether the plaintiff must have known his action to be groundless, in which case only he could be charged with wrong. But when the plaintiff holds the defendant to bail without cause, it has been long settled that an action lies, if it has been maliciously done. It lies, not merely because he arrests maliciously, *where no debt is due*: that takes in too narrow a ground. It lies because he arrests maliciously without ground. The language of the judges in 1 B. & P. 388 is consistent with this principle, and it is clearly reasonable.

In England, there happens to be no room for any distinction or question of this kind, because there the debt is the only ground required for arrest. But if in England the law rendered the existence of some other fact necessary—as, for instance, that the cause of action arose within the kingdom, or that the defendant had no lands, &c.—then, I conceive, the absence of any such ground, being coupled with malice, would, by shewing the arrest to be without cause, entitle the person arrested to an action, as well as if there were no debt due. The injury is the arresting without ground; and as that may happen from mistake or an over anxious pursuit of his own interest, the law allows no action even for this wrong, unless it were done from a malicious



motive. Now, here our statute law requires that a plaintiff, besides swearing to a debt in a sum certain, should make oath that he is apprehensive the defendant will leave the province without satisfying the debt. If he should arrest when there is really no cause for this apprehension, then he arrests without that ground; and if he knew that there was no such ground, and nevertheless sued out the process in order maliciously to aggrieve the defendant, then in my opinion the defendant can have an action for the injury. But it must be clearly shewn that there was no ground for the apprehension, and that the person making the affidavit knew it; and when these two points are made out, and in a strong case, I think the jury can infer the malicious motive, provided it be not disproved. That there was no ground for the apprehension may be shewn to the satisfaction of the jury from the notoriously good circumstances of the alleged debtor, from his substantial settled character, his standing in life and the insignificant amount of the demand advanced against him. The proof however of this part of the case should be strong and clear, involving no question; for if there be but slight ground for doubt as to the prudence of proceeding by non-bailable process, the plaintiff in such an action as this should fail. The proof of the second point in the case—namely, that the plaintiff in the first action must have known there was no ground for the apprehension, and consequently did not entertain it, is more difficult to establish; but it is susceptible of being clearly proved—as, for instance, if he had declared that he had no such apprehension, but was determined to punish or to frighten the other, or to that effect. If the plaintiff indeed had the apprehension, though it was without ground, I do not think this action would lie—nor if it appeared merely that he took no step to learn the circumstances of the debtor, and so made the oath without information. Where the jury have no doubt that the truth was well known to the plaintiff, there they may in a clear and strong case infer malice. In the case before us the debt was large (150*l.*). The debtor was living on a farm, but he had no title to it. It was only proved that his neighbors



had not heard that he had any intention of leaving the province; but his circumstances did not carry undoubted solvency and responsibility on the face of them. From all that appeared in evidence, and, considering what we constantly see in other cases, I should have felt no surprise in learning that this debtor, if sued by non-bailable process, had made some arrangement of his affairs and left the country. The debt was large enough to induce such an apprehension, and there was nothing in his character or property conclusively to repel it. Then it was proved that this defendant was informed by a message expressly sent to him that the defendant was selling his property, and that if he did not look after his debt he would lose it. It was not shewn that this defendant had a particular knowledge of the plaintiff's circumstances. And one of the plaintiff's witnesses declared at the trial that he verily believed the defendant acted *bona fide* and from no malicious motive in making the arrest. Under these circumstances, an action, I think, is not to be encouraged. We cannot be governed by nice enquiries into character in such cases. Such a course would be useless and frequently unsatisfactory; and if this plaintiff should recover, then I confess I can see no good reason why such an action might not follow in every case where the person arrested, being of ordinary character, was living upon a property of greater value than the amount of the debt sworn to. I cannot see that the jury were misdirected, but I think their verdict upon the evidence before them should rather have been for the defendant. The action was treated at the trial as one of a novel character; and after the discussions which took place upon the general principles involved in it, I am apprehensive they failed in giving sufficient attention to the features of this particular case.

I am of opinion there should be a new trial, with costs to abide the event.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—It appears to me that the declaration states a good cause of action, if sufficiently sustained by the evidence. I think the apprehension mentioned in the



statute means a positive apprehension endorsed by some facts, or arising out of some circumstances previously existing, and calculated to create it. If the principle be established that it may be proved to a jury that an affidavit of apprehension, according to the statute, was made without reasonable and probable cause, and maliciously, the next and principle question would be, what evidence it is incumbent on the plaintiff to give to warrant the inference of *mala fides*—or, in other words, to entitle him to call upon the defendant to disclose the grounds of his alleged apprehension; and it appears to me that in the absence of direct proof of threats, or positive acts or declarations of the defendant evincing a malicious purpose in prosecuting the arrest, the plaintiff may give such negative evidence as may be in his power—such as his situation and circumstances in life, his property, pursuits and views, in the opinion and estimation of his friends and neighbors. He could hardly be expected to go further, in the absence of any knowledge of the specific reasons that weighed with the defendant; and without knowing them, he could not of course attempt to rebut them by direct proof. Whether such indirect matter be sufficiently forcible to go to the jury must always rest with the court; and if sufficient for their consideration, it must always remain for them to exercise their judgment upon its weight and effect. *Prima facie*, the honesty and sincerity of the alleged apprehension of the defendant should be presumed, and an ill motive should be attributed to him only upon satisfactory and convincing proof thereof; but when such proof is adduced, whether it be direct or circumstantial, positive or negative, the party injuriously subjected to a wanton arrest is entitled to a remedy and such redress in damages as a jury may deem it just to award. It follows, that I conceive the present action sustainable, and the course of evidence pursued at the trial admissible, provided the force and tendency of the circumstances combined were sufficient to be left to the jury, and to call for explanation or justification on the defendant's part. I think it is expedient on the one hand not to deter creditors from resorting to the remedy of arrest, by



exacting in actions of this nature ample evidence to attach the stigma of malice ; while, on the other hand, debtors in their turn receive such reasonable protection from undue harshness as it was the policy of the statute to provide and it is the duty of the laws to afford. I cannot say that in this case there was not evidence to be submitted to the jury, or that they drew a wrong inference, or acted intemperately in the verdict pronounced ; although I could not say that an inference in favor of the defendant might not have been drawn from some features of the case in evidence as reasonably as against him. The principles of the action, considered in the abstract, were a good deal discussed in the course of the trial, and necessarily adverted to in the charge to the jury ; and they may possibly have felt called upon to pronounce a verdict in accordance with the declared opinion of the court in favor of an action for a malicious arrest, grounded on that part of the affidavit of debt which requires a declaration of apprehended departure from the province, without sufficiently separating the present case from the general question, and considering it under the evidence upon its own isolated merits, with that precision and distinctness which it would have received under the circumstances of an ordinary suit.

*Per Cur.*—Rule for new trial absolute, costs to abide the event.

### DENNISON V. CHEW.

Where parties run the side lines between their respective lots, and possess the land on either side according to such side lines for twenty years and upwards, such possession is confirmed by the Statute of Limitations, although on a survey made according to the statute of 1818 it may turn out that the lines run in the first instance, and according to which the possession has been, are erroneous.

**Trespass:** The plaintiff and defendant were owners of adjacent tracts of land. Upon running the division or side line between them, agreeably to the method prescribed by the provincial statute 59 Geo. III. ch. 14, it was lately ascertained that the plaintiff was in possession of part of the lot covered by the defendant's title. The defendant in consequence took upon himself to remove the division



fence between them, in order to make it conform to the correct line newly run, and for this removal and entry on the land this action was brought. The plaintiff relied upon his long possession, and proved that he and those under whom he claimed had been in undisturbed possession of the piece of land in question for more than twenty years; and that about the year 1807 the former proprietors of these adjacent lots had a line run by a licensed surveyor for the purpose of ascertaining the boundary between them; that they had placed the division fence according to this survey; and that their respective occupations had conformed to it since. For the defendant it was contended, that as he was the proprietor of the lot of which the *locus in quo* was ascertained by the late accurate survey to form a part, the freehold was equally in him, and he denied that under the facts proved his possessory right was barred by the Statute of Limitations. It appears further, that at the time of the trespass committed a son of the plaintiff was working the farm on which was the *locus in quo*. He lived with his father on another lot, received no payment for his services, had no lease, nor was it intended he should have; but he stated that his father let him have the profits of what was grown on the place—the plaintiff having a right of interfering in any way he pleased with the management of the property or otherwise. It was objected at the trial that under these circumstances the plaintiff was not in possession, and could not maintain trespass. A further objection was raised, that a highway intervened between the *locus in quo* and the close by which it was stated in the declaration to be bounded on the east, and a nonsuit moved for on account of the variance. The jury found for the plaintiff—1s. damages.

In Easter Term last, *Bell* obtained a rule nisi for a new trial, renewing the objections taken at the trial. *Draper* shewed cause.

ROBINSON, C. J.—The principal question in this case is one of very extensive application in this province, and it is most important that it should be rightly and firmly settled. The case of *Stewart v. Reddick* (Taylor's Reports), decided



in this court many years ago, has been referred to as in point. The facts of that case are not very particularly stated, and the court was not full, so that it is scarcely safe to rely upon it as one laying down a general principle, which shall govern in all cases like the present. The case now before us may be stated thus: In 1807 the crown grants a lot, numbered four, to the plaintiff, or to some one under whom he claims, and the description in the patent defines the course of the side line, or limit between it and lot number five, as running south  $74^{\circ}$  west. At that time no statute was in force controlling the construction of these descriptions; and it was left to the common law to determine whether south meant the true south, as it might be ascertained by observation of the heavenly bodies, or the magnetic south (the south according to the compass). South according to the compass was most probably what was meant by the description, because I imagine that the plan and report of the original survey gave the courses according to the compass of the surveyor who ran out the lines. If in all cases the court had discarded this construction, and, adhering to the true and most certain standard, had held that the magnetic course was not to govern, the probability is that they would have introduced great inconvenience and confusion by varying the lines from the courses which were in fact intended in the original survey, and in which probably no allowance had been made for variation of the compass.

If, on the other hand, they had felt that they would adopt the course pointed out by the compass, without regarding the true bearing, then these difficulties would have occurred: 1st. The variation differs in course of time. 2nd. The compass used in the original survey, or in any subsequent survey, might not traverse accurately. 3rd. The operation might be inaccurate, from ignorance or inattention. The legislature were desirous of providing some remedy against these difficulties, and in 1818 they decided upon establishing a certain standard for the side lines by which to adjust them all, so that each lot should have its fair quantity of land, and that all the lots should range



alike throughout each concession—a measure just in principle, and one that must in its general effect be convenient and consistent. They enacted that the external side line of the township, from which the lots in a concession were numbered, should be the governing side line, to which the side lines of every lot in every concession should conform in their course. So that whenever hereafter it might be necessary to ascertain the boundary between any two lots in that concession or range, the surveyor would have nothing to do but to proceed to that side line of the township from which the lots are numbered, and having ascertained its true bearing by the most certain method, his duty then is to run the dividing line or limit between the two lots in question, on the same course. The legislature were aware that this mode of settling the boundaries might be found to disturb some persons' possessions, because the surveyor who made the original survey may have run some of the side lines inaccurately, not making them parallel to the actual course of the township lines. Still, they were resolved that their intended uniform system should be enforced; and they made the equitable provision, that when the boundary thus ascertained should vary from that which had been assumed, in consequence of an erroneous previous survey, the person who would lose land by the correction of the error must be indemnified for any improvements he may have made before he shall be dispossessed. This act was passed in 1818; and, in my opinion, the right of entry up to the limits which this act authorizes to be established, must be considered as having accrued at the passing of the act, and not before,—and consequently cannot be barred by an adverse possession under the Statute of Limitations, because twenty years have not elapsed since the passing of the statute. I consider that the act introduced a new standard, and gave a new right. It does not profess to be merely declaratory; and indeed, if it had been clear that a party could have claimed before that to have his lines run upon the principle laid down in that statute, then it would have been unnecessary to pass the statute. As twenty years have not elapsed from the passing of this act,



I do not conceive that the Statute of Limitations can apply to prevent a party having the limits between him and his neighbor adjusted according to the act. The principle of the Statute of Limitations I take to be this—that where one person has held a possession for more than twenty years, which possession, if it were not rightful, must have occasioned a wrong to some person capable within the period of seeking legal redress, the forbearance for that length of time to contest the possession shall be deemed to establish that it was rightful; and persons thenceforward shall not be permitted to advance a claim which (if there were any foundation for it) ought to have been advanced within the reasonable period prescribed by the act.

Here, the right to the piece of land in question rests upon the legal right to have the division line run exactly parallel to the side line of the township, whether that line was originally run accurately or not, or whether its course be or be not the same as that expressed in the letters patent. This right came first by the statute 59 Geo. III., and could not have been insisted on otherwise. But it is said, before that act was passed, and at a period now more than twenty years ago, this plaintiff, and the owner of lot five, had the line run, and that possession has always since been held by each conformably to that line. The evidence, viewing it in its strongest light, only shews that the parties at that time wished to ascertain the true boundary between them, and meant to conform to it; but they were in a common error; there was no adverse holding intended—no defiance by one of the other's right—no determination avowed or shewn to hold to the line that had been run, whether it were the right line or not. Then, a few years after they had had the line run, according to the course stated in the patent, comes the act 59 Geo. III., which directs that the line shall be run in the same course as the township line, whether that agrees with the line set down in the patent or not. That, in my opinion, set the parties at large: it gave a standard to which they were not precluded from resorting to by their having had the line run a few years before according to the former unsatisfactory system; and, in my



opinion, nothing but such an adverse possession for twenty years after the act passed, as would bar the parties under the Statute of Limitations, can preclude them from adjusting their boundaries according to this positive law. If it had been shewn that, twenty years ago, the proprietors of these adjacent lots had, by the help of a surveyor or without, agreed upon a division line, and expressed a determination that it should stand and be final, whether it should be discovered to be erroneous or not, then it might follow that, after twenty years' possession in conformity to this boundary, a conveyance might be presumed, and the parties might not be permitted to dispute the boundary; or, as I mentioned before, if one party had taken possession up to the line when run many years ago, insisting upon it as his right, and in a hostile spirit, shewing a determination to maintain his position, be the right what it might, then the Statute of Limitations might be called in to confirm the adverse possession so long maintained. Not that the case would then, as I conceive, be free from difficulty; because the statute of 1818 comes in before the twenty years expires, and creates a new and distinct right, which the parties are then for the first time in a condition to insist upon. But here, the one party only claimed what he possessed, as believing it to be number four; and the other, supposing it to be part of number four, and pretending no claim to that lot, acquiesced, on that ground only, in his possession. The one party had no idea of dispossessing, nor the other any apprehension of being dispossessed. Here was no waiver of a remedy, for the wrong was not known or intended. The fair construction, I think, to put upon the act of these parties in running the line is, that they wished to ascertain the limits of their respective properties, and imagined they had done so; neither of them, however, wishing or intending to hold except in the faith that the survey was correct. The case of *Hethrington et al. v. Vane* (4 B. & A. 428) strongly supports this view. I think each case, however, must be decided on its own facts: a variation in some one or more circumstances may materially affect the question upon the Statute of Limita-



tions. The general principle, in its application to cases where parties are in a common error as to their boundaries, is a very important one in this province ; but, circumstanced as this case is, I am clear that the parties are still at liberty to have the true boundary between them adjusted according to the statute 59 Geo. III ; and on this ground I think this verdict should be set aside and a new trial granted, the *locus in quo* being the freehold of the defendant according to the evidence.

SHERWOOD, J. (after stating the case)—I think this case analagous in principle to that of *Doe ex dem. Stewart v. Reddick*, decided in this court, and I still adhere to the doctrine of that case, and am of opinion that twenty-eight years' claim of property, together with possession of the land by the plaintiff and those under whom he claims, without any privity of estate with the defendant and those under whom he claims, entitles the plaintiff to the exclusive possession of the *locus in quo* according to the line established by the surveyor of both the original owners, and who was selected by them for that purpose. The defendant, I think, had no right of entry when the action was brought ; he came too late, if ever he had such a right. With respect to the objection that the son of the plaintiff was tenant, and should have brought the action instead of the father, I incline to think the evidence shews he was the agent of the plaintiff rather than his tenant. Upon the whole, I am of opinion the verdict should stand.

MACAULAY, J.—The case of *Doe ex dem. Stewart v. Reddick* decides that the Statute of Limitations is not suspended by the provincial act of 1818, and that when twenty years' possession has followed a division of adjacent lots, an ejectment will not lie, although such line may have been inaccurate according to the provisions of that statute. To the principles of this decision I subscribe. The statute is to be the guide in all unadjusted cases to which it applies ; but it should not be so construed as to alter the previous law of the land touching rights of property in general, as influenced by long continued possession. Twenty years' acquiescence or adverse holding establishes a



right, and the act was not meant to disturb the operation of the Statute of Limitations, or the prevailing rules for quieting possessions. It was meant to establish a regulation for the adjustment of disputed boundaries—not to generate disputes when the parties were already satisfied. Perhaps within twenty years the party might shift the supposed side line between two apparent lots, as previously ascertained by a mutual survey, if not estopped by deed; but after twenty years I should think not so. The statute should not destroy by implication the effect of past time, and ought to be applied in special instances *sub modo*—that is, provided it still remained open to question what was the true limit; but when ascertained by a course of survey mutually satisfactory for twenty years to the owners of adjoining lots, or when an adverse possession of twenty years by one party set all question at rest by virtue of the Statute of Limitations, I do not conceive the act can be resorted to to undo what mutual arrangements, or the lapse of time and long continued actual possession, may have accomplished. The legislature would not, I think, intentionally make a law with such an object, or to produce such an effect.

As to the second point, it is certainly questionable whether the plaintiff had a sufficient possession to maintain trespass; but I still think there was room to leave it to the jury to determine whether he was so possessed or not, depending upon the opinion how far his son was a mere agent or superintendent of the cultivation and management of the estate, without any exclusive interest or possession in the nature of a tenant.

As to the objection regarding the east boundary: the intervention of an allowance for road would seem immaterial, and not to constitute a variance.

The defendant is a trespasser, and there is no sufficient ground to grant a new trial in his favor, having disturbed a long enjoyed quiet possession of the plaintiff. He may of course resort to an ejectment if so disposed.

*Per Cur.* (diss. Chief Justice)—Rule discharged.



## STRATFORD V. SHERWOOD, ONE, &amp;C.

Where a cause was referred to arbitration, costs to abide the event, and it appeared that the arbitrators allowed the item charged, reducing the price only (it being an account for medicine and attendance), and gave 10*l.*, the court refused to restrain costs under the Court of Requests Act.

The plaintiff sued the defendant, an attorney of this court, for medicine, attendance, &c., and the cause was referred to arbitration, with condition that the costs should abide the event. The arbitrators awarded 10*l.*, allowing for all the medicines charged, but reducing the prices, and allowing nearly all the visits. One of the arbitrators swore he thought 7*l.* 10*s.* would have been enough, but the other arbitrator desired to award 10*l.*, and he assented, that plaintiff might have no ground to complain. Both the arbitrators were practising physicians in Brockville. The defendant moved to reduce the costs to those of the Court of Requests, under the 28th clause of 3 Wm. IV. ch. 1, the plaintiff being under no necessity of suing him in this court, since his privilege as an attorney was taken away in respect to any demand suable in the Court of Requests, by the 6th clause of the statute.

ROBINSON, C. J.—The application, in my opinion, should not be granted; and if the Master, under the section of the act referred to, had taken the verdict as conclusive evidence that the action could have been tried in the Court of Requests, full costs ought, I think, to have been ordered, upon application to this court, or to a judge in vacation, as the act directs. The sum allowed is the utmost sum to which the jurisdiction of the Court of Requests extends: much more was claimed. It is evident it must have been a matter of opinion for a jury to assess the charge; and when 10*l.* has been allowed, it is impossible to say, in such a case, that more than 10*l.* might not have been claimed on very probable grounds. Both parties are now before the court; and if an order were necessary to enable the Master to tax full costs, it should be now made, I think, upon the view of the case presented to us. The taxation which has been made is such as the case requires, and this rule must be discharged. The question turns upon the



28th clause of the statute, which provides, "that if any action shall hereafter be brought in any of the superior courts which might have been tried in the Court of Requests, no higher costs shall be taxed to the plaintiff than would have been receivable in the Court of Requests, unless it shall be shewn to a court, or to a judge thereof in vacation, that from the nature of the plaintiff's evidence or the situation of his witnesses, he could not have proved his case in the Court of Requests, or unless in the action in the superior court the defendant shall have been arrested." When the legislature desired to confine to the higher jurisdiction actions which were of the proper competence of the district court, they provided, "that no more costs shall be taxed against the defendant than would have been recovered in the district court, unless the judge who tried the cause of such suit or action shall certify in open court at the trial that it was a fit cause to be withdrawn from the district court and commenced in the Court of King's Bench." In carrying into effect this last mentioned act, this court has always held it to be a proper ground for certifying, that although the verdict may have been for a small sum, yet the plaintiff's demand called into question a claim of too large an amount to be legally investigated in the district court; and, whenever it has seemed to the court either that it was necessary to go into evidence of transactions which in the amount involved were beyond the jurisdiction of the district court, or that the plaintiff, in good faith and on probable grounds, sought to recover an amount which the district court could not award to him, they have constantly granted a certificate. They have not, in cases of the latter description, regarded the verdict as conclusive against granting the certificate; though they have held that without a certificate the Master must be guided by the verdict; and that when the sum awarded would be recoverable in the district court, in such an action as that stated in the record, he must treat the action as being brought for a matter within the jurisdiction of the inferior court.—*Gardner v. Stoddart*, Draper, 101.

I take it, that as between the King's Bench and district



courts, where it appears to the satisfaction of a judge that the plaintiff did sincerely urge, and upon reasonable grounds, a demand for a debt or damages greater than could be recovered in the district court, a certificate is usually granted ; although the jury may, in the exercise of their discretion, have given damages barely within the jurisdiction of the district court. Where there is no precise computation to be formed on the evidence, and where the testimony would have warranted a verdict beyond the mark as well as below, it would be hard indeed that the plaintiff should be compelled, at the peril of losing his costs, to relinquish a large portion of what he may fairly claim, for fear that the jury, preferring the testimony of one witness to another, or forming an arbitrary estimate of their own, may bring his damages within the lower jurisdiction. A plaintiff sues, for instance, to recover damages in trespass for a horse taken from him ; and having given 20*l.* for the horse and honestly valuing him at that price, he brings his action in the King's Bench. The jury, upon contradictory evidence as to value, or from lenity to the defendant, choose to give him but 15*l.* ; would it not be hard that he should lose his costs, when if the jury had chosen to value the horse one shilling higher, it would have shewn him to have resorted to the proper tribunal, and when the valuing him over 15*l.* might have been more consistent with the evidence than valuing him under.

So, in the case before us, the plaintiff urged a demand for visits and medicine much beyond 10*l.* The arbitrators, having heard the evidence, gave him 10*l.*, the utmost sum that he could have recovered in the Court of Requests. It is perhaps perfectly right that they should have allowed no more ; and the plaintiff must submit ; but it would be hard that in consequence of their having done so he should in effect lose everything ; for the costs he would be liable for would probably exceed the sum recovered. He ought at least to be allowed to have his evidence heard, and his case tried ; but if his evidence went to establish a demand beyond 10*l.*, he would have been stopped in the Court of Requests by a denial of their jurisdiction. It seems to me



reasonable, that when there is a power left to this court or a judge to regulate costs in this respect, the plaintiff should only lose his costs when there is no good reason to doubt that he proceeded unnecessarily in the higher court for a demand which he might have recovered in the lower jurisdiction. In this spirit, the statute of 1818, which respects the district court, has been acted upon; and, considering that the two statutes have a precisely similar object in view (the only difference being in the courts), they ought to be acted on according to the same principle, unless there is a difference in the language of the two statutes which shews the legislature meant otherwise. I do not think there is. It is reasonable, in my opinion, to hold that the words, "unless, from the nature of the plaintiff's evidence, he could not have proved his case in the Court of Requests," have this meaning—namely, that when the plaintiff, in the *bona fide* prosecution of his right, submits to the jury, upon probable grounds, a claim which, upon the evidence adduced by him, is beyond the jurisdiction of the Court of Requests, it shall then be in the discretion of this court, or a judge, to allow full costs. When the evidence tends to establish a demand exceeding the jurisdiction of the Court of Requests, there it may be said, in my opinion, that his evidence is of "such a nature" that it could not be received to prove a case in that court. I know not indeed what other meaning to attach to the expression, "nature of the evidence." It cannot mean the *quality* of the testimony, as distinguished into parol or written, or by deed or record; because every species of evidence is receivable in the lowest court as well as in the highest. Neither can it be taken to allude to the possibility of the evidence being required to be taken in a foreign country by commission, because that can only be where the witnesses are out of the jurisdiction of the court, and that contingency is expressly provided for in another member of the same sentence, where the "situation of the witnesses" is recognized as another cause for resorting to the higher court. As respects the propriety of certifying, each case must rest on its own facts. It is to be presumed that



a sound discretion will be exercised ; in which case full costs will be granted when they ought to be, and not otherwise. But, without such a control, and taking the verdict as the only guide, it is clear that much hardship would arise in these cases, and also in cases apparently within the jurisdiction of the district court, if it were not prevented by certifying on such grounds as the plaintiff in this case relies upon.

We may suppose a builder bringing his action for work done, upon an agreement for a specified price which would entitle him to 25*l.* : he proves the agreement and the work done under it, and thus makes out a case which he could not have proved in the Court of Requests, because the defendant or the court would immediately have told him that it belonged to a higher tribunal. Having therefore necessarily brought his action in a higher court, it may probably happen that the defendant calls a witness to declare his opinion that the work is ill done or the materials bad, and then make out a claim to a reduction in the value. The plaintiff's witnesses may swear the contrary, but it is left to the jury to decide ; and upon evidence which would warrant a determination either way, they think fit to reduce the price and give a verdict for 10*l.* Ought it to follow in such a case, that the plaintiff must lose his costs because he did not foresee that the defendant would produce such witnesses, and that the jury would believe them in preference to his ? It may in truth be rather hard that the decision should be against him upon the point of damages ; but to say that he should be prohibited from advancing his claim and producing his witnesses, would be hard indeed ; and yet it must be so if the verdict of the jury is to be taken as determining that he ought not to have sued in the higher court ; for in the Court of Requests his evidence could not have been heard. I have looked at the cases cited. That of *Harsant v. Larkin* (7 Moore, 68) is strongly in favor of the plaintiff ; and the language of the court applies with much force to the statutes, which do give, as I conceive, the power to carry the provisions as to costs into effect, upon the just principles there stated. The two cases



reported in 5 D. & R. 371, and 2 Mar. 145, are cited as authorities against the allowance of full costs to this plaintiff. They are both upon the statutes 39 and 40 Geo. III. ch. 104; sec. 12, in which there is no provision enabling the court or a judge to certify in order to give the plaintiff costs; and it has been held, in consequence, that the amount of the verdict and the nature of the cause of action, as stated in the record, must be conclusive, as being the only guide for determining the jurisdiction. The case reported in 5 B. & C. 532, is upon the 23rd Geo. II. ch. 33, sec. 19; and the language of that act precludes all question upon its construction; for the verdict is expressly to be taken as deciding the right to costs, unless the judge who tried the cause shall certify that title to land or an act of bankruptcy came principally in question. Our statutes place the rights of the parties, I think, upon a more reasonable and just footing. That which respects the district court has been always carried into effect on the principle I have stated. The language of the other act, which respects the Court of Requests, admits, in my opinion, of a similar course of proceeding; and it is reasonable to suppose that the legislature intended both to be acted upon in the same spirit.

SHERWOOD, J., gave no opinion.

MACAULAY, J., agreed with the Chief Justice.

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#### GORDON V. FULLER.

The statute 5 Geo. II. ch. 7, sec. 1, respecting affidavits to be made in England for proof of debts sued for in this province, is not repealed by the provincial statutes regulating the introduction of the law of England, or of evidence.

*Quære*—If such affidavit made before a suit is commenced can be read at a trial subsequently had; or, if such affidavit must be entitled in the cause.

If a commission to examine witnesses abroad, issued at the instance of one party and executed at his expense, be returned by the commissioners into court according to the statute, the opposite party has a right to call for and make use of the evidence at the trial of the cause.

*Semble*, that an order for the publication of the evidence may be obtained before trial.

Assumpsit upon a running account, in which the plaintiff claimed a balance of 4000*l*. The defendant had been held to bail. At the trial, the plaintiff offered to prove his case by an affidavit sworn before the Lord Mayor of London



before this action brought, shewing the plaintiff resided in London and was a British creditor, that the debt was contracted in India, and proving a certain balance due. It was objected that this evidence was inadmissible. The plaintiff then called on the defendant to produce a commission which had been sued out under the statute 2 Geo. IV. ch. 1—and the issuing of which had been agreed to by the plaintiff—to examine a witness in England. It had been executed at defendant's expense. The examination of the witness was on interrogatories in chief by the defendant, and cross interrogatories by the plaintiff. The defendant's counsel declined producing it—at least, until the plaintiff would pay the expense of its execution. Some other but slight evidence was offered on behalf of the plaintiff; and on the charge of Macaulay, J.—who told the jury he doubted the admissibility of the affidavit, and that the other evidence adduced would scarce justify more than nominal damages—the plaintiff voluntarily submitted to be called, with leave to move.

In Easter Term last, *Sullivan* obtained a rule nisi to set aside the nonsuit and grant a new trial. The *Solicitor General* shewed cause. The court took time to consider, and now judgment was given.

ROBINSON, C. J.—There are two questions presented in this case: 1st. Can the production of the commission be called for by the plaintiff in order that he may give the evidence contained in it as part of his case. 2nd. Is an affidavit of debt sworn before the Lord Mayor of London, the plaintiff being a British creditor resident there, legal evidence to prove a debt contracted in India against a debtor domiciled here. It will be more convenient to dispose of the second question first. It turns upon the British statute 5 Geo. II. ch. 7, which runs thus: "Whereas his Majesty's subjects trading to the British plantations in America lie under great difficulties for want of more easy methods of proving, recovering and levying of debts due to them than are now used in some of the said plantations. And whereas it will tend very much to the retrieving of the credit formerly given by the trading subjects of Great



Britain to the natives and inhabitants of the said plantations, and to the advancing of the trade of this kingdom thither, if such inconveniences were remedied. Be it enacted, that from and after the 29th September 1732, in any action or suit then depending or thereafter to be brought in any court of law or equity in any of the said plantations for or relating to any debt or account wherein any person residing in Great Britain shall be a party, it shall be lawful to and for the plaintiff and defendant, and also to and for any witness to be examined and made use of in such action or suit, to verify or prove any matter or thing by affidavit or affidavits in writing, upon oath made before the Mayor or other Chief Magistrate of the city, borough or town corporate in Great Britain, where or near which the person making such affidavit shall reside, and certified and transmitted under the common seal of the city, &c.; and every affidavit so made, certified and transmitted, shall, in all such actions and suits, be allowed to be of the same effect as if the person making the same upon oath as aforesaid had appeared and sworn to the matters contained in such affidavit in open court, or upon a commission issued for the examination of witnesses." The addition and place of abode of the deponent must be specified on the affidavit.

2nd clause.—In all suits to be brought in any court of law or equity, by or on behalf of his Majesty, his heirs and successors, in any of the said plantations, for or relating to any debt or account, his Majesty may prove his debts and accounts and examine his witness or witnesses by affidavit, in like manner as any subject may do by that act. A false affidavit taken under that act is made perjury. The title of the act is, "An act for the more easy recovery of debts in his Majesty's plantations and colonies in America."

The 4th clause, making lands and tenements liable to be sold for the satisfaction of debts, makes all lands in the said plantations belonging to any person indebted, liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by such person to his Majesty or any of his subjects—which I mention merely to



shew that parliament meant to give the facility to British creditors extensively, and without regarding the origin of the debt or where contracted. By the 7th and 8th Wm. III. ch. 22, sec. 9, it is enacted that all laws, by-laws, usages or customs at this time, or which shall hereafter be in practice, or endeavored or pretended to be in force or practice in any of the said plantations, which are in anywise repugnant to that act, or to any law thereafter to be made in this kingdom, so far as such law shall relate to and mention the said plantations, are illegal, null and void to all intents and purposes whatsoever. By the 14th Geo. III. ch. 13, it was enacted that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; and that all causes which should thereafter be instituted with respect to such property and rights shall be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinances of the governor and legislative council to be appointed under that act. A legislative council is then provided for by that act, and power is given to them to make ordinances for the peace, welfare and good government of the said province, with the consent of his Majesty's Governor, Lieutenant-Governor, &c.; any of which ordinances his Majesty may disallow by his order in council, to be promulgated at Quebec. There were some reservations or restrictions on this legislative power.

The ordinance touching religion, or by which punishment may be inflicted greater than fine or three months' imprisonment, shall not be of any force or effect until the same shall have received his Majesty's approbation. And "nothing in the act contained shall extend, or be construed to extend, to repeal or make void within the said province of Quebec any act or acts of the parliament of Great Britain heretofore made, for prohibiting, restraining or regulating the trade or commerce of his Majesty's colonies and plantations in America; but that all and every the said acts, and also all acts of parliament heretofore made concerning or respecting the said colonies or plantations, shall be and



are hereby declared to be in force within the said province of Quebec, and every part thereof."

By 31 Geo. III. ch. 31, the Legislative Council of the province of Quebec is abolished, Upper Canada made a separate province, and a legislature constituted therein; and it is enacted (sec. 2), that his Majesty, his heirs and successors, shall have power, by and with the advice and consent of the Legislative Council and House of Assembly of the province, to make laws *for the peace, welfare and good government thereof*; and that all such laws being passed by the Legislative Council and Assembly of the province, and assented to by his Majesty, his heirs or successors, or assented to in his Majesty's name by the governor, lieutenant-governor, &c., shall be, and the same are hereby declared to be, by virtue and under the authority of this act, valid and binding to all intents and purposes whatever within the province.

33rd section—"That all laws, statutes and ordinances which shall be in force on the day to be fixed in the manner hereinafter directed for the commencement of this act, shall remain and continue to be of the same force, &c., as if this act had not been made, and as if the said province of Quebec had not been divided, except in so far as the same are expressly repealed or varied by this act, or in so far as the same shall or may by virtue of or under the authority of this act be repealed by his Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and House of Assembly, &c."

46th section, reciting the statute 18 Geo. III. ch. 12, which declares, "that the parliament of Great Britain will not hereafter impose any duty, tax, or assessment, payable in any of his Majesty's colonies in North America, except only such duties as it may be expedient to impose for the regulation of commerce; and reciting that it is necessary for the general benefit of the British empire that such power of regulation of commerce of the British empire should continue to be exercised by his Majesty and the parliament of Great Britain, enacts that nothing in this act (31 Geo. III. ch. 31) contained shall extend or be construed



to extend to prevent the effect or execution of any law which hath been or at any time shall be made by his Majesty, &c., and the parliament of Great Britain, for establishing regulations or prohibitions, or for imposing, levying or collecting duties for the regulation of navigation, or for the regulation of the commerce to be carried on between the said two provinces, or between either of the said provinces and any foreign country or state, or for appointing and directing the payment of drawback of such duties so imposed, or to give to his Majesty, his heirs and successors, any power or authority by and with the advice and consent of such Legislative Council, &c., to vary and repeal any such law or laws, or any part thereof, or in any manner to prevent or obstruct the execution thereof."

By provincial statute 32 Geo. III. ch. 1, it is enacted, "that the authority of the laws of Canada, as forming a rule of decision in all matters of controversy relative to property and civil rights, shall be annulled throughout this province, and shall be no longer of force or authority. And (sec. 3) that after the passing of that act, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same. And (sec. 5) that all matters relative to testimony and legal proof in the investigation of fact, and the forms thereof, in the several courts of law and equity within the province, be regulated by the rules of evidence established in England."

By the imperial statute 6 Geo. IV. ch. 114, sec. 49, it is enacted, "that all laws, by-laws, usages or customs at that time, or which thereafter shall be in practice, or endeavored or pretended to be in force or practice in any of the British possessions in America which are in any wise repugnant to that act or to any act of parliament made or thereafter to be made in the United Kingdom, so far as such act shall relate to and mention the said possessions, are and shall be null and void to all intents and purposes whatsoever.

Upon these statutory provisions the question must be determined.

As a general principle, bearing on our introduction of the



English law, civil and military, I think (as I stated in *Bank of Upper Canada v. Bethune*) that this general adoption of them was not intended to supersede any particular provision that had before been made in respect to a certain matter by a competent legislative authority, applying itself particularly to the colony. It was an act to give a general rule in cases not specially provided for. On the other hand, I think this provision of 5 Geo. II. ch. 7, does not come within the 46th section of 31 Geo. III. ch. 31; and that, if it depended on the question whether that clause (and that clause only) disabled our legislature from repealing it, it would not now be in force. To receive such an affidavit in proof of debt at the trial does certainly militate against the rules of evidence as established in England; and therefore, after the passing of our provincial statute 32 Geo. III. ch. 1, it cannot be admitted, unless—1st, it can be held that the repeal of the British statute 5 Geo. II. ch. 7, is not within the intention of the statute 32 Geo. III. ch. 1; or, 2nd, was not within the power of the colonial legislature.

As to the *intention*: There is no other evidence of an intention to repeal this British statute than that the general provision adopting the English rule of evidence is inconsistent with it; and no exception is made of this statute: the subject is not at all alluded to. What is there then to shew it was not intended? 1st. The objects of legislation being defined by 31 Geo. III. to be the making of laws for the peace, welfare and good government of the province, and therefore internal in their nature, it does not seem consistent with this description of their power that they should occupy themselves in passing an act to do away with facilities given by British statutes to British subjects, &c., residing in England, having debts to enforce against the inhabitants of this colony; and so questionable, at least, whether such an act comes within the scope of their authority, that the presumption is, the colonial legislature would not do it without bestowing their attention on the subject in an especial manner, and evidencing their intention in express words. The 5 Geo. II. had an object in



view not confined in its aspect to the peace, welfare and good government of this province ; and it seems repugnant that a special enactment of the superior power, for such an object, should be overruled by a legislature having power only to make laws for its own peace, welfare, &c.

2nd. Where positive laws of our own legislature are repealed, it is usual to specify them by citing them ; and so also of British statutes, though perhaps not invariably.

3rd. The legislature have shewn by their act 43 Geo. III. ch. 1, that they did not mean to repeal, nor conceive they had repealed, by the 32nd Geo. III., another and more important clause of this same British statute, on which the present question arises—namely, the 4th clause of 5 Geo. II., which relates to the sale of lands and tenements in execution ; and yet there would be the same reason for holding that repealed by our statute 32 Geo. III. as the clause in question ; for the 3rd clause of the 32nd Geo. III. introducing the law of England generally in respect to property and civil rights, is inconsistent with it ; but still there is no exception expressed. As they have thus declared that they had not abrogated this part of the 5th Geo. II., it follows that they did not consider themselves to have abrogated the other. I can see no satisfactory distinction. And a similar argument may be drawn from our provincial statute 33 Geo. III. ch. 7.

Secondly—if the legislature intended the repeal, had they the power ?

1st. The direct effect of such repeal would be to take from persons resident in Great Britain conveniences secured by an express British act of parliament to them and them only ; and I cannot conceive that the 31st Geo. III. ch. 31, gives to this legislature such a power. When the 32nd Geo. III. ch. 1, was passed, the 7th and 8th Wm. III. ch. 22, for preventing frauds and regulating abuses in the plantation trade, was in force ; and if the 32nd Geo. III. was in any degree repugnant to the 5th Geo. II. (an act passed after the 7th and 8th Wm. III., and relating to and mentioning the plantations), then it was illegal and void under the last mentioned act. Nothing can be more



repugnant to any act than an attempted repeal of it, and the consequence of being illegal and void must follow, unless the effect of the 31st Geo. III. ch. 31, is to make our legislature independent of this provision of 7 and 8 Wm. III. It may be contended that it has that effect—1st, because parliament delegated the power to make laws for the colony to our legislature having the concurrence of the king; and that all that is done by this delegated authority (within their scope) is to be regarded as if done by the British parliament, on the principle of execution of powers. 2nd. By specifying in the 46th clause of 31 Geo. III. certain exceptions to this power which do not embrace such a subject as that in question, we must take it there are to be no other exceptions, and that all laws passed in this province not coming within the exceptions in the 46th clause, and not repugnant to the Constitutional Act, which creates the power, must be within the competence of our colonial legislature. But to this I answer—1st. That the power is to make laws to operate directly only on the peace, welfare and good government of this province (though indirectly they may affect—which is inevitable—persons resident out of it), and that it does not reasonably extend to the repeal of an act of the British parliament expressly passed to afford facilities to British subjects resident in England. 2nd. That as to the 46th section, it is inserted *ex majori cantela*, as a guarantee upon a delicate and important constitutional point, and to preclude jealousies and doubts; and was proper also for preventing any acts of legislation within the colony which, though not affecting to repeal or vary the British statutes in those excepted matters, might yet “in some manner prevent or obstruct the execution of them;” and this it was thought prudent expressly to prohibit. 3rd. That the British parliament did not mean to give to this colonial legislature authority to repeal acts of parliament prior to 31 Geo. III. expressly binding in the colony (and especially such as did not concern the colony merely) is evidenced in the strongest manner by 6 Geo. IV. ch. 114, sec. 49. And this recent statute is not merely a proof that parliament did not intend that the 7th and 8th



Wm. III. should, after the passing of 31 Geo. III., be a dead letter in Canada; but it is in itself a clear enactment of parliament settling, if it were necessary, this question; for it provides expressly that all laws in force or practice in any of the British possessions of America, which are in any wise repugnant to any act of parliament made or to be made in the United Kingdom, so far as such act shall relate to and mention the said possessions, are and shall be null and void to all intents and purposes whatever.

It is said that 32 Geo. III. ch. 1, repeals the British statute 5 Geo. II. ch. 7 in this particular. If it does, it must be repugnant to it. If it be repugnant to it, then it is an act in force, or attempted to be put in force, in this British possession, repugnant to an act of parliament made in the United Kingdom relating to and mentioning the British possessions in America; and therefore as to such act, so far as it does relate to and mention such possessions, it is null and void under the imperial statute 6 Geo. IV. ch. 114.

I have mentioned that the legislature of this province, when they passed the act 43 Geo. III. ch. 1, shewed very plainly their impression that the 5th Geo. II. ch. 7 remained in full force in this province, so far at least as those clauses were concerned which made lands and tenements liable to the satisfaction of British creditors. That they were right in assuming this is confirmed by the judgment of the privy council in England upon the appeal from this province in the case of *Gray v. Wilcox*, in which case I remark that Sir Arthur Pigott and Mr. Stephen insist on it strongly in their printed reasons of appeal on behalf of the plaintiff in the court below that it was repugnant to reason to maintain that our statute of 32 Geo. III., adopting the English law as the rule of decision in all matters of controversy relative to property and civil rights, had the effect of excluding that particular portion of the law of England which was passed in express reference to the colonies, and which was intended to give to British subjects certain rights and advantages in our courts of justice. Upon whatever arguments the privy council may have founded their



decision, they did determine the 5th Geo. II. to be in force so far at least as regarded the sale of lands ; for the question before them had no relation to the other provision now under consideration ; and I am unable to find any satisfactory ground for deciding that the 32nd Geo. III., while it left the 5th Geo. II. ch. 7 in force so far as regarded the sale of lands, had the effect of virtually repealing those other clauses of the same statute which gave to British creditors the facility of proving their debts by affidavit.

We have ascertained that in Lower Canada the courts have uniformly held the 5th Geo. II. ch. 7 to be in force as respects the provisions now in question, notwithstanding that the ancient Canadian law, as the general rule of decision, is given by the British statute 14 Geo. III. ch. 83, which would make the argument stronger in favor of the supposed virtual repeal. But, while we hold the statute to be for this purpose in force, it has appeared to us to require consideration, whether the affidavit offered as proof of a debt can be received if sworn before any action was interdicted, or whether it must not be made in a suit depending, so that it may be properly exhibited in the court and in the cause. My opinion is that it is admissible in evidence, although sworn before the suit is commenced. The words used do not import that the affidavit is to be made or sworn in a suit commenced, but that in any action brought or to be brought after the passing of the act, a witness may verify a matter or thing by affidavit sworn before the mayor of any city. I see nothing in this language or in the remainder of the clause that requires the affidavit to be made after the suit has been commenced ; and I do not think it reasonable to ascribe such an intention to the legislature when they framed the act. Communication across the Atlantic was at that time much more unfrequent and less expeditious and regular than at present ; and I cannot see any reason for desiring to incur the delay of first sending out instructions to commence the suit, and then to wait for intelligence that the suit had actually been commenced before the affidavit could be sworn. When an arrest was intended, the affidavit sent out to warrant the arrest would,



according to such a construction, though made by an indifferent person as agent, be of no further use ; but the party must be arrested and imprisoned, and then another affidavit be sworn and sent out to be used in proving the debt. I see no good reason in the act or out of it for believing that this was meant. If the statute makes an affidavit, sworn for the purpose, admissible, although no action was at the time commenced, then it makes such an affidavit one upon which perjury can be assigned, within the principle of the case in 7 T. R. 451.

With respect to this provision of the statute 5 Geo. II.—until this objection was raised I was always under the impression that it was generally considered as admitted to be in force. I have never heard it questioned ; and I should not be surprised to find that such affidavits have been received as evidence in our courts. In my professional practice I have seen several such sent out from England to enforce the payment of debts ; but I cannot call to mind any case in which it became necessary to use them. As to the possibility of injustice to the other party from the admission of such evidence, it is in the power of the court in any particular case to obviate any reasonable apprehension on that head by taking care that the defendant, if he desires it, shall have an opportunity of examining the deponent, or any other witnesses, on his laying proper ground for suing out a commission. And, though it is certainly an exception to the general law of evidence, yet it is to be considered that the condition of the greater number of the colonies at the period when the statute was passed called for a facility of this nature ; and the object of maintaining the commercial credit of the colonies by facilitating the remedy of the British creditor, was one in which people on both sides the Atlantic were at least equally interested. It is besides worthy of remark, that this mode of proving a debt by affidavit was not only not foreign to some of the colonies, where the English system of taking evidence *viva voce* in open court was not in use, but it is by no means unknown to the laws of England ; for at the time this act



was passed, and for many years afterwards, it was the constant practice on the common law side of the Exchequer to prove debts before commissioners and a jury, in order to obtain an extent in aid, in no other manner than by producing the affidavit upon which the extent against the original debtor had been sued out. In the present advanced state of this colony, with the facility we have of taking out commissions to examine on interrogatories, and the comparative ease and expedition with which evidence can now be thus obtained, it may be thought reasonable that the enactment 5 Geo. II. should no longer be continued; but the question before us is, whether it is at present actually in force. It being my opinion that it is in force, the nonsuit, I think, should be set aside without costs, and a new trial granted.

As to the point of practice regarding the plaintiff's right to call for the production of the commission: It appears, from the language of the act 2 Geo. IV. ch. 1, that the legislature intended the evidence to be returned with the commission into court. In this case it happened that the commission, when executed, got into the hands of the defendant, who had sued it out; but that was accidental. It came from Europe, directed to the Chief Justice of this court, by which it was doubtless intended to place it in the hands of the court—or, in the words of the act, “to return it into court;” and it was agreed in argument that the question as to the plaintiff's right to use the evidence should be determined in the same manner as if the commission were in fact at the time in the possession of the court. Then, as to the plaintiff's right to call for the reading of the evidence taken in answer to the defendant's interrogatories—it appeared to me at first that it could not be maintained, and several arguments suggested themselves against it; but, upon consideration, we are all of opinion that the plaintiff had a right to the production of the evidence at the time he called for it. In England, in the common law courts, a commission to examine witnesses can only be had by the assent of the opposite party; but that assent being given, and the commission having



issued, and the evidence taken under it and returned, I do not see that there is ground for treating the evidence so taken as being in a different situation in respect to the rights of the parties over it from what it would be in this country. The commission being issued here as of right, on the prayer of either party, and not as an indulgence by consent, we have held the allowance of costs to be effected by that circumstance, and that the expenses of the commission, &c., are in this country taxable against the losing party, in the same manner as other costs; but there seems no necessity for making any other difference. Now, in England, it appears that the evidence, when returned into court with the commission, is equally accessible to both parties in the cause. I draw that inference from the case of *Stephens v. Crichton* (2 Ea. 259); and if one party can thus become possessed of the evidence and learn all that the other party's witnesses have sworn, before the latter has used his evidence at the trial, and whether he shall choose to use it or not, then the objections, which seem at first to lie against the claim made by the plaintiff in this cause, lose their force.

Another consideration occurs to me as entitled to weight. As it seems that the plaintiff might have obtained from the court office copies of the defendant's evidence taken under the commission, he had it in his power to know what had been done for or against him, and might naturally rely upon that evidence going to the jury. If some of the evidence appeared to bear materially in his favor, he would of course desire it should be given at the trial; but he could hardly think it necessary or prudent to incur the expense of taking out a second commission to England to have the same evidence given by the same witnesses. He would, of course, rely upon the return to the defendant's commission being produced; but if, when the cause came to trial, the defendant, learning that the evidence was unfavorable to him, should forbear to call for the commission and return, the plaintiff would be taken by surprise, and materially prejudiced. There is but little to be found in the books on the subject, and nothing in the books of prac-



tice, that can help in deciding this question. The few cases on evidence taken under commissions or mandamus in the East Indies, turn upon the provisions of the statute directing how such evidence shall be taken. In this case, the plaintiff, when he called for the commission and evidence, offered to pay half the costs. We should have no authority, I think, to make a condition that half the costs should be tendered, and that a tender of half would suffice. It rather appears that no question respecting costs can be suffered to affect the right in this case, because our law and practice throws the costs of the commission in common with other costs upon the losing party. If the plaintiff, after a full trial, had lost the cause, the costs of the defendant's commission would be left to be defrayed by him in common with the other costs of the cause ; and, as plaintiff resides abroad, the defendant either has, or might have had, security for the costs. If the plaintiff had succeeded, of course the defendant must have lost the costs of the commission, as well as all his other costs. Upon this point of practice our opinion therefore is in favor of the right of either party to call, during the trial, for the evidence which has been returned to the court under a commission, though I have still some doubt upon the question.

SHERWOOD, J.—I am of opinion that the 5 Geo. II. is in force in this province, except so far as any part of it may have been repealed by some act of the British parliament. I therefore think that when one or both of the parties to a suit, either at law or in equity, instituted in this province, reside in Great Britain, an affidavit made conformably to the intent and meaning of that act may be read in evidence on the trial of such a cause. The allowing such *ex parte* proof is a great deviation from the English rules of evidence established in this province by the provincial statute 32 Geo. III. ch. 1, section 5 ; and I think the provisions of the British statute should not be amplified or extended in their effects by any equitable construction. By the terms of the act there must be an action pending, in my opinion, at the time the affidavit is made, to entitle it to the character of legal testimony ; and, as there was no action pending when



the affidavit now in question was sworn, I think it cannot be read on the trial of this cause. If it were untrue, I doubt whether perjury could be assigned upon it; and my present impression is that it could not. At all events, I think the defendant, who objects to the affidavit, is not to have it read against him in evidence by the very enactment itself, there being no suit between the present parties in existence at the time.

With respect to the point whether the plaintiff was entitled to have the evidence read which was given under the commission issued, upon the application of the defendant to take the examination of witnesses in England, I incline to think he had the right. The examinations are to be considered, by consent of both parties, as having been returned into this court. The 17th and 18th sections of the provincial statute 2 Geo. IV. ch. 1, allow either plaintiff or defendant, in an action instituted in this court, to apply to the court or a judge in vacation to examine witnesses who are aged, infirm or about to leave the province, or who reside without the limits of the province; and the court or judge, upon hearing the parties, may issue a commission accordingly. The commission and examinations are to be returned into this court, and all examinations duly returned are to be received as evidence in the cause. Either party in the suit has a right to apply for a commission to examine witnesses, but the statute expressly requires that he shall give notice to the other party. This notice is of course not only to allow the other party to object to the commissioners proposed, but to propose others, as well as to give him ample opportunity to cause all the witnesses to be cross-examined. Now, it appears to me that the legislature meant by this law to make the examinations taken by the commissioners evidence on the trial of the cause, to the same extent as if the testimony had been given *viva voce* in open court by the same witnesses. All evidence adduced on the trial of the cause by one party may be used by the other on the same occasion, at his election; and therefore, according to the principle just advanced, the written examinations of the witnesses duly



taken under the commission issued in this cause at the instance of the defendant, and duly returned into this court by the commissioners according to the statute, ought to be read on the trial of this cause at the request of either party. The expenses attending the issuing of the commission, as well as its execution and return into court, ought not, in my opinion, to be at all taken into consideration till the general costs of the suit are ultimately taxed by the master. I am of opinion the nonsuit should be set aside and a new trial granted without costs, on the ground of the plaintiff's right to have the examinations read which were taken by the commissioners, and duly returned as before stated.

MACAULAY, J.—It is upon the following grounds that I am disposed to think the 5 Geo. II. ch. 7, no longer applicable to this province as respects the proof of debts by affidavit:—

The province of Quebec did not form one of his Majesty's American possessions when that act was passed, and when first conquered the civil laws of Canada prevailed, and were, I believe, conceived to continue until the final cession in 1763. Afterwards, a royal proclamation and commission issued, imparting or substituting (it was supposed) the law of England, civil as well as criminal. In 1774, the civil law of Canada, as enjoyed under French dominion, was restored; the criminal law of England being retained, and all British statutes relating to the American colonies extended hither. The 5th Geo. II. ch. 7, might be considered either as in force by virtue of its own terms, or as expressly extended by the 18th section of 14 Geo. III. ch. 83 (probably by the latter authority), and consequently must have been engrafted upon the French code of civil jurisprudence, also revived simultaneously by the same British statute. The English rules of evidence in commercial matters were partially introduced into the province of Quebec by the ordinance 25 Geo. III. ch. 2, sec. 10. In 1791, the 31st Geo. III. ch. 31, in contemplation of a division of the provinces, provided the present constitution, and forms the source from which the powers and authorities of our provincial statutes flow. It authorized the formation of



local legislatures, and enacted that his Majesty should have power, with the advice and consent of the legislative council and assembly in each province, to make laws for the peace, welfare and good government thereof, not being repugnant to that act. All which laws are thereby declared to be, by virtue of and under the authority of that act, valid and binding to all intents and purposes whatever within the provinces respectively. And the 44th section specifies the exceptions to the general powers conferred. The existing laws of Canada, as declared by the 14th Geo. III. ch. 83, or altered afterwards by ordinances of the province of Quebec, under the provisions thereof, were continued in both provinces of Upper and Lower Canada after the division thereof, subject to the control of the local legislatures, and as respects Upper Canada a sweeping innovation was doubtless anticipated—no less than the abrogation of the old laws of Canada and the introduction of those of England; and accordingly we find that by the first of our provincial enactments (after reciting that the prevailing system was not congenial to the inhabitants of this province), it was enacted that the provisions of 14 Geo. III. ch. 83, should no longer continue; but that, in lieu thereof, the law of England should form the rule of decision in all matters of controversy relating to property and civil rights. Nothing is said expressly touching the 5th Geo. II. ch. 7; but no doubt it was in force here when that provincial statute received the royal assent; and the clause touching the liability of real estate for the satisfaction of debts was afterwards recognized in the provincial statute 43 Geo. III. ch. 1; and although, in reference to the law of England, coupled with the provisions of 31 Geo. III. ch. 31, relative to the tenure of such real estate in Upper Canada, it was contended that even that portion of the act in question had been excluded from local operation, yet it was ultimately determined in the last resort still to have the force of law here. It follows, that no implied repeal of that statute can be inferred from the first clauses of the first provincial act. It is at the same time apparent that the first clauses, touching the rule of decision in matters of controversy relative



to property and civil rights, was not supposed to preclude or prescribe the rules of evidence, for the same statute afterwards provided, in section 5, that all matters relative to testimony and legal proof in the investigations of fact, and the forms thereof, in the several courts of law and equity in this province, should be regulated by the rules of evidence established in England; and the two principal questions are — 1st. Whether the provincial legislature possessed the power to subject suitors, in actions for money demands, resident in England, to the *lex loci* in this respect—to the same rules of evidence prescribed for the inhabitants of the colony and all others; in other words, to remove the operation of the 5th Geo. II. ch. 7, from this province as a rule in such cases, or to introduce incompatible regulations on the same subject. And if so—secondly, whether by implication (for it is not done in express terms) such effect has been accomplished. The statute 5 Geo. II. does not include all suitors and witnesses living in England, but extends only to cases of debt or account, and perhaps contemplated only debts contracted in England. 1st—as to the power: I consider it imparted by the 31st Geo. III. ch. 31, which is very comprehensive and almost unlimited in its terms; and I do not regard the 5th Geo. II. ch. 7, as passed for establishing regulations and prohibitions, or for imposing, levying or collecting duties for the regulation of navigation or of the commerce between the province and any other part of his Majesty's dominions, &c., within the meaning or expression of the 46th section of that act. Nor, I believe, has it been adverted to in the imperial parliament as forming one of the acts for the regulation of trade and navigation in the late revision and amendment of these laws. And, subject to the exceptions therein expressed, I do not see that the powers of the colonial legislature are otherwise abridged, so far at least as respects the laws in force at the time it was first organized, however liable to control by subsequent imperial statutes naming the province or including it in a more general allusion to the North American possessions. The 14 Geo. III. ch. 83, re-established the old civil law, and



confirmed the criminal law of England ; but the general powers of the provincial legislature over both has, I believe, never been doubted, and has been frequently exercised. The king has almost unqualified power to make laws binding upon and within the province, with the advice and consent of the Legislative Council and Assembly ; not as a mere prerogative right, or under a system of government established by commission as a royal government emanating from the grace and prerogative powers of the crown, but by virtue of a British statute, which says that all laws so made (if not repugnant thereto) shall by virtue of that act be valid and binding ; and in order not to abridge the superintending control of his Majesty's government a double negative is granted to his Majesty, who may annul and disallow acts, although assented to in his name by the Governor or Lieutenant-Governor representing him in his provincial parliament here. With these and other such qualifications and safeguards as the imperial parliament deemed expedient, free scope is given to the action of the colonial legislature in all other respects ; so much so, that I cannot but regard the provincial statute, when duly passed, of equal force within the province with British statutes, when not repugnant to the 31 Geo. III. ch. 31. In other words, I feel constrained to read the 5th section of our first act as if it had been incorporated in the 31 Geo. III. and formed one of its provisions, and conceive it competent to the provincial parliament (as a mere question of power) to exclude the operation of the 5 Geo. II. in any or in all respects, by an act duly assented to by or on behalf of his Majesty ; and if so, to produce the same effect by implication arising from the introduction of incompatible or other contradictory regulations. If, as would perhaps not be questioned, the local legislature could abrogate all the present laws creating courts of justice, and enact that no future courts should hold jurisdiction of causes of action not arising within the province, it would follow that if they could exclude the recovery of debts contracted abroad altogether *a fortiori*, they might regulate the course of legal evidence to prove



any such debt in a court of law created by its authority, with a general jurisdiction like this court.

The second enquiry—whether this clause of it has been excluded. No provincial act mentions it by name, and consequently, if affected, it must be by implication. I have already quoted the clause of our first act which, in furtherance of the previous clauses adopting the law of England, prescribes the rule of evidence and the forms thereof. The second chapter establishes the trial by jury. The 34 Geo. III. ch. 2 created this court, and its language in so doing should not be overlooked. It shews the impression of the legislature that we had the law of England comprehensively, and the system of judicature is organised and adapted to such a code. Section 23, with a view to testimony and legal proof in this court and the *Nisi Prius* Courts, emanating from or auxiliaries to it, according to the forms that regulate similar courts under similar circumstances in England, recites that it might in many cases be desirable for the furtherance of justice to obtain the deposition of witnesses in civil suits, which could not be had by the ordinary process of *subpœna*, and authorised the issue of commissions to examine persons residing without the limits of the province, when the cause of action arose without the jurisdiction of the court. A subsequent act regulates the examination of witnesses upon interrogatories at the present day in terms no less enlarged. Regarding the whole scope and spirit of our provincial act, from the first to the last, so far as respects the general adoption of the law of England, it appears to me that the 5 Geo. II. ch. 7, sec. 1, was not repealed, but excluded from operation here by implication, especially by the 5th section of the first statute introducing inconsistent provisions, and that this is the soundest construction to place upon the same, although it may at times operate inconveniently towards suitors living in England. The arguments are doubtless very powerful in favour of the opposite view, and it would be insincerity in me not to confess that the opinions expressed by my learned brothers, supported as they are by very strong reasoning and authority, have materially weakened the confidence I felt in



the opinion advanced by me at Nisi Prius; and although I do not feel able entirely to yield to them, I am not insensible of their great weight and force. But, in my opinion, the provincial parliament not only had the power, but should be taken to have intended the exclusion of the 5 Geo. II. ch. 7, sec. 1, in relation to the forms of testimony and legal proof; or at least to adopt one universal regulation on the subject, as evinced by the 5th section, so often quoted, and the provisions contained in subsequent enactments. They might well do this upon grounds of general and uniform justice, without meaning at all to infringe the other provisions of that statute, respecting the sale of lands for the payment of debts. I think the rules and forms of evidence were intended to be universal; and, although the subsistence of 5 Geo. II. ch. 7 in favor of British creditors may not be incompatible with such a rule in all other respects, but may be regarded as engrafted on the English system as a whole, still I cannot say I consider such to be the scope, object or real intent of the local act in that behalf. The forms of legal testimony and proof by the law of England, in the examination of witnesses abroad and beyond the jurisdiction of their courts, is by a commission and interrogatories, for which ample care has been taken to provide by the legislature of this province. In the absence of any such provision the argument in favor of the continuance of 5 Geo. II. would be much strengthened. Without knowing the state of the local law of Lower Canada touching legal proof, any recognition of the 5 Geo. II. in the courts there would afford no assistance as a precedent; and, touching actions of non-residents, we have constantly applied the law of England to them in this court, in exacting security for costs, whether the suitors were resident in England or elsewhere. The imperial statute 6 Geo. IV. ch. 114, sec. 49, has been urged as annulling our local statutes, should they have infringed upon the 5 Geo. II. ch. 7, but I do not think so. It appears to me that act must be construed together with the 31 Geo. III. ch. 31, and other statutes, relative to its subject matter, and as applied to this province. I think (considering the nature and object of the statute of



which it forms a part) that it is merely meant to assert anew the provisions touching trade, &c. contained in the 31 Geo. III. ch. 31, sec. 46, or as a substitute for similar provisions contained in the 7 & 8 Wm. III. ch. 22, sec. 9. But, if susceptible of a more enlarged application, I cannot for a moment suppose it was intended to abridge the power or to contravene any of the provisions of 31 Geo. III. ch. 31. When it speaks of laws, bye-laws, usages or customs repugnant to that or other British acts, mentioning or relating to his Majesty's plantations, it includes the West Indies and all other his Majesty's possessions in America, (as did, in nearly similar terms, the 7 & 8 Wm. III. ch. 22, sec. 9), and it refers to laws, usages, &c. founded upon the old systems of colonial government by charter or otherwise, and not to laws made under and with the sanction of an imperial statute. In construing that clause, it should be remembered that it was intended to embrace all the American colonies—not Upper Canada in particular—and that all the old colonies, including many of the islands and plantations still subject to the British crown, were established and formed local legislatures, and made laws and adopted usages, &c. without the authority of any English statute. The Canadas form a peculiar exception, and are very differently circumstanced, as I have already noticed. If within the province local acts are made, by virtue of 31 Geo. III. ch. 31, of equal force with imperial statutes, so long as subsequent British statutes mention the American possessions in general, and not the Canadas in particular, such statutes ought (as respects these provinces) to be construed *sub modo*—that is, in connexion with the 31 Geo. III. ch. 31, as long as it remains in force. I cannot say therefore that either in law or reason suitors resident in England are not or ought not to be subjected to the same course of evidence and proof as parties resident elsewhere. The general question is not perhaps material to be determined on this occasion, for even admitting the 5 Geo. II. ch. 7 to be in force, the present affidavit may not be admissible, as being extra-judicial—made before any suit was brought or any issue joined to ascertain the facts material and requir-



ing to be proved ; and though the 5 Geo. II. declares that wilful false swearing in the affidavits therein mentioned should incur the pains and penalties of perjury, it might be difficult to frame an indictment if the pendency of a suit could not be averred. The statute expressly mentions actions *to be brought*, and contemplates disputed facts to be tried, and without a suit it could hardly be called a judicial oath, and without an issue it would be difficult to shew the materiality of the subject matter. I do not say the latter is an insurmountable objection. I think the former of more weight. There is also room to argue that the affidavit ought to be entitled in the cause, in order to identify it with the suit. The statute does not enjoin it, but English decisions on the validity of affidavits seem to hold that where a case is pending the affidavit should be entitled accordingly, as indispensable to the support of a prosecution for perjury—as an essential, without which it could not be regarded as an affidavit in the cause or of a judicial character.—3 T. R. 601 ; 1 Smith, 457 ; 7 T. R. 661, 451 ; 13 Ea. 189. At all events, I do not say that the 5 Geo. II. ch. 7, contemplated affidavits being made prospectively, with a view to suits to be brought, and that such affidavits, when there is no suit, should, if false, incur the crime of perjury, though no suit should ever be instituted. It was rather meant to afford facility as a substitute, or to provide for the want of local provisions in the colonies, touching the examination of witnesses abroad upon interrogatories, when issues should be joined in suits prosecuted in the colonial courts, requiring to be proved by persons resident in England. The clause touching proof by affidavits in the King's suits does not weigh materially, in my judgment, for the construction of statutes in relation to the crown rests on particular grounds, and is governed by peculiar principles ; and if by reason of not being named the King would not be bound by the provincial act, it would not thence follow as a consequence that all his subjects are not bound, and *vice versa* it may not follow from their being bound that he is also.

With respect to the commission for the examination of witnesses in this cause—the act of 1812 requires them, when



executed, to be by the commissioners returned to the court, and when so returned it would seem that either party may move publication and obtain copies.—4 M. & S. 500; 1 B. & B. 519; 7 Bing. 358. When placed on the file of the court, they would seem to become accessible to both parties, though placed there at the exclusive expense of one only. It follows that in this case, if the commission was at the trial to be regarded as returned to the court, the plaintiff had a right to use it; if not yet so returned, the plaintiff may obtain a rule upon the defendant's attorney, who has received it from the commissioners to be so returned to bring it into court, when on application order for publication may pass, or such other course be pursued as the practice or authorities may warrant.

*Per Cur.*—Rule absolute for new trial without costs.

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#### ANNIS ET AL. EXECUTORS OF HEMINGWAY V. LOWES.

A. & B., being in partnership, applied to C. to endorse a note for their accommodation. The note was signed by A. alone, but was represented by both as drawn on account of the firm, and that both were liable to pay it. When it became due A. had absconded, C. having paid the note. *Held*, that he might recover the amount he so paid from B., as money paid, &c. to his use.

Assumpsit—defendant suffered judgment by default, and damages were assessed at the last assizes for the Home District. The facts were as follow:—The defendant and one Sowerby came together to Hemingway, the plaintiff's testator, with a promissory note for 40*l.*, signed by Sowerby alone, made payable to Hemingway or order, and asked him to endorse it, that they might get it discounted; they both said they were partners, engaged in business as waggon makers, and they wanted the money for their joint use, that it was unnecessary for Lowes to sign the note, because they were partners. Hemingway endorsed the note upon this request, and another person became second endorser upon a like statement which they made to him. The note was discounted at the Bank, and the money was paid into Sowerby's hands. It was not in fact proved what application he made of the money, but he soon afterwards absconded. When the note became due Hemingway and



the other endorser being called upon paid it between them; and Hemingway's executors brought this action to recover the money advanced by him, suing the defendant as one of the partners, the other having absconded. The declaration contained the common money counts, and the jury assessed the damages at the full amount advanced by Hemingway.

*Baldwin* obtained a rule nisi to set aside the assessment as contrary to law and evidence. *Sherwood, H.* shewed cause.

ROBINSON, C. J.—We are of opinion that the plaintiff was entitled to assess his damages upon the count for money paid &c. for the defendant. It seems very clear that he could not recover against the defendant as a maker of the note, treating the signature of Sowerby alone as a partnership signature. But there is no good ground on which his action for money paid &c. can be resisted. Looking at the note only, the debt is the debt of Sowerby alone, and if the evidence did not go beyond the note, there could be no recovery against the defendant; but the additional evidence was properly received, and, coupled with the note, it proves that the money was paid upon the undertaking of both. It is to be considered whether the Statute of Frauds creates a difficulty. I think it does not, for this was an original not a collateral undertaking. The language of the defendant was not "Endorse the note, and if you have to pay the money I will save you harmless;" but it was to this effect—"We want the money; the note is the note of both, though one partner only need sign it; the money is for our joint use, and therefore if you have to advance it we are both liable to repay it, not the one if the other fails, but both equally and on our joint account." This was clearly no undertaking to pay the debt of another, because no debt had then been contracted.—2 Ea. 330. It was not an undertaking to answer for the miscarriage or default of another, but an acknowledgment that if the money was ever to be paid by Hemingway it would be paid for defendant's use as well as for Sowerby's, and that he and Sowerby were equally liable to repay it. It was not an undertaking for Sowerby but for himself, and not such an undertaking as the statute was required to guard against.



It seems clear, from several cases, that if the bank on such a statement made to them had advanced the money on the credit of the note, they could have sued both for money lent; and Hemingway having ultimately to pay as endorser, has the same equitable right to look to both—8 B. & C. 427; Holt, 607; 2 Ld. Ray. 1085; the only difference is in the form in which he must seek his remedy—namely, for money paid, instead of money lent, because it was the bank who lent the money.—15 Ea. 7; 3 Camp. 309, 493; 1 Camp. 384, 463; 3 T. R. 760; 3 Ea. 185. It is true it was not proved that the money did in fact pass to the use of both, but that can make no difference. It was asked for by both, and the assurance of both given for its repayment, and if the one partner acted unfairly by the other afterwards in the matter, that could not affect the interest and rights of third parties.

*Per Cur.*—Rule discharged.

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#### JOHNSON V. CREW.

A builder has no lien for payment upon a house erected by him on the land of his employer. Where A. contracted to build a house for B., and to deliver possession thereof when finished, upon which he was to be paid: *Held*, that no action would lie to recover the price until an absolute and unreserved delivery of the house had taken place, and that he has not a right to withhold the key of the house until he received payment, though B. had not acquired any title to the land on which it was built.

Assumpsit upon a special agreement for the building of a house, brought to recover the sum agreed to be paid for the work when completed. The first count in the declaration set out the agreement, which was—that plaintiff should build a cottage of a certain description for the defendant, to be finished in a workmanlike manner, and that the defendant should pay the plaintiff 200*l.* on the completion of the cottage and “the delivery of possession of the same;” the plaintiff then averred that he did build the cottage according to the agreement, “and delivered the same,” yet that the defendant did not nor would pay the 200*l.* according to the agreement. Common counts were added, and among them one for work and labour and materials found. Plea—Non-assumpsit. The written agreement was produced at



the trial, and corresponded with the declaration. The land upon which the cottage was built was the property in fee of one Logan, who had leased it to the plaintiff for a term of years, upwards of fifteen years having still to run. It had been verbally agreed that the plaintiff should accept from Logan other lands in lieu of the lot on which the cottage was built and some acres adjoining. Writings were prepared for this purpose, but owing to plaintiff's delay were not executed. Defendant had agreed with Logan for the purchase in fee of this lot, but that agreement was not carried into effect, because of plaintiff's delay in surrendering his interest to Logan. Plaintiff was aware of this agreement and assented to it, but after the cottage was built he still retained his title to the land, and defendant became apprehensive that after his paying for the house the plaintiff would withhold the possession, or eject him after letting him in. When plaintiff considered he had finished the house, he wrote to the defendant "to come forward and take charge of the house, and pay the money according to contract." The defendant then went and objected to some of the work, but not strongly; he desired a few days however that he might have it inspected; the plaintiff, who kept the key, demanded his money; the defendant insisted that plaintiff should first surrender his term to Logan, in order that he might obtain his title. They came to no understanding; the plaintiff took away the key, and then brought this action. The defendant afterwards went and asked for the key, that he might get into the house, but the plaintiff refused to let him have it until he brought the money. The jury found for the plaintiff, expressing an opinion that defendant accepted the house.

In Easter term *Draper* moved to set aside the verdict, as contrary to law and evidence. *Bell* shewed cause.

ROBINSON, C. J.—There can be no doubt that when the defendant exacted from the plaintiff that he should surrender his term in this land, as he had long promised and was honestly bound to do, he stipulated for nothing but what is reasonable, and the justice of the case is strongly with him in resisting payment till he is secured from future annoy-



ance from the plaintiff in this respect; but I do not see that the recovery could be objected to because this reasonable request of his was not complied with. He had bought the land from Logan, not from the plaintiff, and it is to be presumed had secured himself a remedy against Logan, in case he should be disappointed in obtaining a title. The building agreement was independent of all considerations about title. But the plaintiff fails, I think, in this: He cannot recover on the agreement set out, because he avers he delivered possession of the house according to the agreement, which he did not do; his evidence did not support his case.—12 Ea. 145; 1 Wils. 110. Neither can he recover on the count for work, labour and materials, because he did not ever offer to deliver up the house unconditionally, but insisted that the money must first be paid him, which would leave the defendant at his mercy, and perhaps drive him to an ejectment to gain possession of the house which had been built. He was not warranted in withholding complete possession till the money was paid. On general principles and in ordinary cases, a builder has no lien on the house which he has built or repaired—it would be most inconvenient that he should have. The ground on which it stands is inseparable from the house, and such a lien would exclude the owner from his own freehold.

The agreement might, to be sure, be such as to give the builder a right to insist on retaining possession till he was paid, but the agreement before us was clearly not intended to have that effect, or to give any lien to the plaintiff beyond what he could otherwise claim. Though the plaintiff happened to retain the title of this piece of ground in him at the moment, it is fair, under the circumstances, to regard the parties as contracting under the same spirit as if the defendant was owner of the land on which plaintiff was to build the house—he was so in the contemplation of both, though something remained to be done to perfect his title, which the plaintiff was bound to do, and had no pretence for omitting. The stipulation in the agreement is in reason to be treated as a condition inserted at the instance of the defendant and for his protection. He says by it—I am not



to pay you till you have finished the house and delivered me the possession. Exacting this condition, he cannot be in a worse situation than if he had said nothing respecting the possession, for certainly the agreement gave no lien to the plaintiff, and as the common law gives none, I am of opinion it was incumbent on the plaintiff, when he had finished the house, to let the defendant unreservedly into possession of it. If the defendant had not accepted the possession when unreservedly offered, the plaintiff clearly would not have been without remedy. Upon the evidence given, I think he is not entitled to recover in this action, and that a new trial should be granted without costs.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—The only counts in the declaration upon which the defendant could recover under the evidence, are the first on the special agreement and that on the general claim for work and labour and materials. He fails under the first, by not proving an actual delivery of the house as alleged, for it could not be regarded as delivered to the defendant so long as the plaintiff retained the possession and kept the key under claim of a lien on the building till paid. He cannot recover for work, labour and materials generally, because there is a special agreement still executory, not executed fully on his part, without delivery or a tender and offer of full possession unconditionally, and an agreement under which, for all that appears, he may recover in due season—1 N. R. 354. It was argued, that as the jury had found the house to have been erected according to contract, and accepted by the defendant, the action should be sustained on one of the two counts mentioned, upon the principle that the plaintiff had a lien upon the building, resulting from the nature of the agreement and the payments required to be thereby made by the defendant, concurrently with the delivery; wherefore the plaintiff, having done all incumbent on him on his part—namely, by erecting the house and offering to deliver it on being paid—the contract was on his side executed, and his right of action complete, was for work and labour generally, although he retained possession by virtue of the lien, resulting in his favor. But



it appears to me the jury, in finding that the defendant had accepted the house, must have meant that he approved of it as to materials, workmanship and correspondence with the contract, because it was clear the plaintiff held the key and had not absolutely tendered or delivered it, without which the defendant could not have received or accepted possession. It is my impression, that if the plaintiff could retain such possession until paid, although the defendant was willing to accept but not prepared to pay—if he had a right of lien, either as a general rule on such occasions or as arising out of the special agreement, he might sustain the verdict on the count for work, &c. because there was evidence of an offer to deliver on being paid, and the jury found the work duly performed and approved of by the defendant; and when building contracts of this kind are fully executed or the work absolutely accepted, general *indebitatus assumpsit* for work and materials would, I think, lie; but upon consideration I do not find myself warranted in upholding the verdict on any such ground—8 B. & C. 277; 2 M. & R. 296, 301; 5 B. & A. 942; 2 B. & A. 755; 3 B. & C. 1; 4 D. & R. 619. Although a right of lien frequently attaches to goods and chattels sold or made until the price be paid, yet no such lien attaches upon houses erected under building contracts, unless expressly sanctioned by the terms of such agreement, when it forms a species of mortgage, including an interest in the estate. The land belonging to and being in the possession of the proprietor and not the builder, the materials, as far as incorporated in the structure, become annexed to and form part of the freehold or real estate, and vesting, as to title and possession, accordingly. Consequently contractors for such works must rely on the personal liability of their employer under the contract, in an express security guaranteed by substantive agreement. No lien results in law in their favor by reason of the expenditure of their toil and material on the estate and for the benefit of the owner. The plaintiff cannot therefore support a claim under a general right of lien, nor does it appear to me that any results from the agreement. The utmost that can be said of it is, that in contracts



where there are mutual and dependent conditions to be performed on both sides, where one party tenders and offers to perform his part, he becomes entitled to an action without actual performance, and that in the present case delivery and payment are concurrent acts, and that as the plaintiff offered to deliver upon being paid, and the defendant failed in payment, the plaintiff could forthwith prosecute for the price, and at the same time retain the building in possession. The answer is, that he could not do so, unless to assert a lien upon it, in which event he could. The rule as to dependent conditions in covenants or agreements, touching a right of action (no lien subsisting), I take to be this, that the party intending to sue must do all incumbent on his part, and he must at least tender delivery, when, if the other party refuses acceptance, he may recover on that ground in a special action for not accepting; but if the other party is willing to accept, he must eventually deliver or completely perform his part, to entitle him to sustain his suit. Whenever the opposite party obstruct or forbid, or discharge him, or refuses to accept or do anything essential on his part to enable the other to execute his contract, then a right of action accrues to the latter, who may allege such obstruction or refusal &c. in excuse of full performance; but when the other side is willing to go on to the end, perfect performance must take place. It might be withheld if preferred; and an action of the other party might be repelled upon shewing a readiness and offer to perform, for then the relative situation of the parties would be reversed; but, in the absence of a right of lien, an offer to perform, but performance withheld, although the party contracted with was willing to accept, will not impart a right of action. Where there is a right of lien the case is otherwise, and herein consists the difference. If a person has a right of lien, and offers delivery &c. upon being paid, withholding it however by reason of his lien for the price, then an action lies in default of payment, although absolute performance is fallen short of; he retains possession, not by reason of the concurrent conditions in the contract, but of the right of lien; and a suit may be maintained for goods bargained and sold,



but not delivered, or specially upon the agreement according to the subject matter. Now the right of lien does not universally prevail. It subsists in many cases in transactions touching goods and chattels, whether sold, made or repaired; also, in equity a right of lien often attaches to real estates sold, for the price or balance of the purchase money, but I find no right of lien upon buildings erected in favor of the contractors, unless created in the special instance by express agreement, when, as I have observed, the real estate becomes pledged in the nature of mortgage. Thus, in the present case, no lien subsisting as a general privilege in favor of builders, the agreement itself imparts none; all that can be said of it is, that it contains dependent or concurrent conditions, rendering delivery and payment concurrent and simultaneous acts, so that on delivery plaintiff was entitled to be paid; wherefore if the plaintiff would sue for the price he should make delivery, unless the defendant refused to accept; or, if the defendant would sue for not delivering, he should tender the price, and if not refused, make actual payment. No right to withhold possession could vest in the plaintiff against the defendant's willingness to receive it, unless this case be peculiar, by reason of the apparent interest of the plaintiff in the soil; but upon reflection I do not see that any difference should be created thereby. It may be fair to presume that the defendant admitted the plaintiff's right to the soil, or that he should be estopped from disputing his right to the possession thereof, from having consented to erect a house thereon for him. It seems a recognition of his title to the possession at least, and if not, so far from its supporting a claim of lien, it is a powerful argument against it, as constituting (under the evidence given touching the title) a forcible reason why the defendant should have made the delivery of possession a condition precedent to the plaintiff's right to be paid; but, however dependent in that respect, yet a condition precedent to any right of action for the money, thereby affording protection to the defendant, so far that he was not obliged to pay the money until placed in possession of the house, or at least so far that the plaintiff could



not withhold possession and at the same time recover by course of law the price of the work. If he could do so, then he might enforce payment in the first place, and put the defendant to his ejectment to obtain possession of the building ; in which action his right to recover, as against the plaintiff's lease, may be very questionable. It seems most just to range this under the same rules that apply to and govern other building contracts of a like kind, where the estate and possession of the soil are unequivocally in the party for whom the work was performed.

*Per Cur.*—Rule absolute without costs.

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#### SCOTT ET AL. V. DOUGLAS.

Assumpsit will now lie against the endorser of a promissory note made payable to A. B. or bearer, though A. B. have not endorsed the same, on delivering it to the endorser.

Assumpsit against defendant as endorser on a promissory note made payable to Thomas W. Douglas or bearer, and endorsed by the defendant, who was the father of Thos. W. D., to the plaintiff. At the trial it was objected that this action could not lie against the defendant, and in Easter term last this question was argued by *Draper* for the plaintiffs and *Sullivan* for the defendant. The case stood over for judgment.

*Per Cur.*—The opinion of the court has been already given on this point in the case of *Farrett v. Sheldon* and others. We think it clear that an action may be sustained against the endorser of a note made payable to A. B. or bearer.

The necessity of proving notice to the endorser of non-payment by the maker was superseded by evidence given at the trial.

*Per Cur.*—Postea to the plaintiff,

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## GROVER V. CLARK AND CLARK.

The Court will not receive secondary evidence of a promissory note where a party to whom one witness swears he had enclosed it is not called to account for it, though such party is an attorney's clerk, and it was enclosed to him in the course of business, and the attorney himself swears he has searched his office for it in vain, and believes it to be lost or mislaid.

Assumpsit on a promissory note. The note declared on was not produced. The plaintiff proved that it had been in the possession of an attorney at Toronto before the action was brought, and that a clerk in that attorney's office had sent it by post in a letter, as he thought, to a clerk in the office of the attorney at Cobourg, who afterwards brought the action. That attorney was called at the trial, and declared that he had lately searched in his office and could not find the note, and believed that it must be either lost or mislaid; but his clerk, to whom it was said to have been sent, although he was within reach of a subpœna, and in fact was in the assize town at the time of the trial, was not called to prove that he had placed the note in the office, or that he had ever received it. It was objected, that without calling this clerk the plaintiff was not entitled to go into secondary evidence of the note, and a non-suit was moved for. The judge reserved this point.

In Easter term the point was argued by —— for plaintiff. *Solicitor General* for defendants.

ROBINSON, C. J.—However little merit there is in the objection, we think we are compelled to give way to it, and to decide against the plaintiff on the point reserved—2 B. & C. 494; 3 D. & R. 669. The case of *Freeman v. Askill* has been cited as in point against the objection, but it is distinguishable from the present. There was probable evidence given there of the destruction of the instrument, and besides, it was sworn to have been delivered in open court at the sessions to the Clerk of the Peace or his deputy; that placed it in effect in the office, for it became by the delivery in court one of the archives of the office, and the presumption was strong that it must have been taken to the office with the other papers of the court, if not destroyed as useless. A decision upon such facts cannot form an authority in this case. If, instead of being a com-



mon promissory note, the writing sued upon were an agreement of a special nature, it would not be thought safe or reasonable to let in parol evidence of its contents, without laying a clearer ground for dispensing with the writing. The principle is an important one, and must be preserved in force. If the plaintiff desires a new trial on payment of costs, to avoid the necessity of proceeding in a new action, we are willing that he should have it.

*Per Cur.*—Rule absolute for non-suit, unless plaintiff elected to take a new trial on payment of costs.

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### WELLS V. CREW.

A. lent a horse to B. for a special purpose, and while B. was using him, consistent with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A., having seen the horse, refused to take him, and went to B.'s residence (20 miles from where the horse was left), and demanded him back sound as received. *Held*, that B.'s non-delivery of the horse after thus demanded did not furnish evidence of a conversion, and that A. could not sustain an action of trover for his value under the circumstances.

Trover for a horse. Plea—The general issue. The following facts appeared at the trial:—In May 1834 defendant was coming down Yonge-street with his waggon and horses on his way to Toronto, where a fair was to be holden, he stopped at plaintiff's house, and plaintiff having not long before bought a horse, which resembled one of defendant's, he proposed to defendant to leave one of his own and drive his down in his place, in order to shew him at the fair, and that he might be perhaps able to sell him, intending, as he said, to follow defendant down, which however he did not do. Defendant came to town, and on his return, as he and others were putting the horses to the waggon, this horse, which was young and had been restive all the time, took fright and they ran away with the waggon through the town; plaintiff's horse was injured; defendant left him in consequence at Elliott's inn in town and returned to plaintiff's the same evening, and told him of the accident, and where the horse was left. Plaintiff at first objected to let defendant have his horse till he got his own back, but at length consented. This was about the 20th May. The



next day plaintiff wrote a letter to defendant, in which he stated that he had been at Toronto to see the horse, and had determined to abandon him to defendant, and call upon him to pay his value; that he had left him in Toronto, where he would be skilfully treated by a farrier, but recommended defendant to look after him. After this, in July, plaintiff went to defendant (20 miles from town) and demanded his horse sound as received; defendant said he would do no such thing. At this time the horse was not at defendant's, nor was it proved what became of it after it was left at Elliott's. It was said that after a time Elliott sold him for his keep. The jury found for the plaintiff 25*l.*, subject to the opinion of the court whether a conversion was established by the evidence. The evidence was conflicting on the point whether the horse was taken to town at the request of the plaintiff or of the defendant, but the jury found that it was by desire of both, on a speculation to be shewn at the fair, and at the suggestion of plaintiff.

The point was argued by the *Solicitor General* for plaintiff and *Baldwin* for defendant.

ROBINSON, C. J.—We are all of opinion that this action cannot be sustained, and that the verdict for the plaintiff must be set aside. The gist of this action is a wrongful conversion, which must consist in the destruction or appropriation of the chattel. A mere non-delivery by a bailee, under circumstances which afford no evidence of a conversion, will not support trover—Burns, 31, 2825; 1 Str. 129; 2 B. & P. 439; Cro. Eliz. 219; 2 Salk. 655; 4 Esp. Ca. 157; 1 Camp. N. P. C. 439; Bull, N. P. 44; 2 Ld. Ray. 1085; 1 Salk. 27; 2 Salk. 15; Bulst. 306; Holt, 606. The defendant had the horse as bailee for a special purpose. While using him in a manner consistent with the bailment the horse was accidentally injured, in such a manner as prevented the defendant from returning him forthwith to the plaintiff. That accident, and the leaving him at a stable at Toronto in consequence, do not supply evidence of a tortious conversion. The plaintiff then being made aware of the circumstance, sees the horse, and gives notice that he will not take him back. The defendant could not deliver



him back in any other condition than he was in, and though afterwards the plaintiff demanded the horse sound as received, the defendant's non-compliance is no evidence of a conversion, for it does not appear that he could deliver him sound as received, or that he could have delivered him at all. The demand was made twenty miles from the place where the horse was left, and in the meantime it seems that the plaintiff and defendant, being each resolved to treat the horse as the property of the other, had declined having anything to do with him, and let him remain till he was sold to pay his keep.

In *Devereux et al. v. Barclay et al.* the distinction that a mere omission to deliver cannot make a bailee liable in trover, though a mis-delivery to a wrong person will, is clearly laid down—2 B. & A. 702. If the plaintiff can recover from the defendant the value of his horse, it must be in an action of a different description from this.

SHERWOOD, J. and MACAULAY, J. of the same opinion.

*Per Cur.*—Postea to the defendant.

### STANTON V. ANDREWS.

A petition to the Lieutenant Governor complaining of the conduct of Commissioners of the Court of Requests, and charging them with partiality, corruption and connivance at extortion, signed by a number of persons, and praying for redress, is an absolutely privileged communication in its nature, and no action for libel will lie upon it, though the defendant had circulated it and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description.

**Libel.** The alleged libel consisted in the defendant having signed a petition to the Lieutenant Governor of the province, setting forth "that under the provisions of the late act of parliament, regarding the recovery of petty debts, his Excellency had been pleased to appoint William Dickson, junr., Absalom Shade, Robert Ballingall, William Wield, John Smith, Robert Murray and plaintiff, to be commissioners of the Court of Requests at Dumfries: that the five first named from the beginning declined acting with Murray and Stanton, who alone had taken upon themselves the duties of commissioners: that the proceedings of



those gentlemen, in the exercise of the important functions conferred upon them, had been fraught with the greatest partiality and injustice, and been the means of causing throughout the township much dissatisfaction: that the clerk of said court (a son of Murray's), under the sanction of the said acting commissioners, exacts on all process issuing thereout double the fees allowed by the said act: that the two commissioners above named, regardless of everybody's convenience but their own, have established the said court in a remote and unimportant corner of the said township, being that part thereof where they themselves reside, to the great detriment and injury of the majority of the suitors therein: that the memorialists were fully prepared to establish by the most indisputable testimony all the allegations of their memorial, should his Excellency so require; they therefore prayed his Excellency to take the foregoing circumstances into consideration, to supersede the existing commission, and to appoint such persons, inhabitants of said township, to be commissioners of said Court of Requests, as his Excellency should consider most fit and competent." This was signed in three columns by a great number of persons. At the head of the third column stood the name of the defendant. The township assessor, James Dickson, a merchant in good business at Galt, was called, who swore that defendant came to him and asked him to go round with the petition, which he consented to do, and received it the next day by one Chapman's boy, with Chapman's horse for witness's use, at which time there were twenty or thirty names attached. Defendant said the witness should be paid a reasonable compensation for his trouble in soliciting subscriptions, but he had not at the time of the trial received anything. The witness did not go out of the township, and did not himself sign the memorial, but said that he had read it and explained it to subscribers, so far as reading, but it was not read to all; he said that he did not keep people in the dark, and obtained two hundred names: that much was said about the conduct of the Court of Requests, and he believed 800 or 900 signatures might have been procured, but would not swear



so: that he thought those who signed were not actuated by malice: that there was public complaint, and many expressed satisfaction that the matter was moved in. He expressed his opinion that the defendant was not actuated by malice, but a desire to promote an investigation. He did not recollect that the signers complained of being personally aggrieved. He did not go to the plaintiff's neighborhood, which however is well settled; he was told there was another petition in that direction, and that the population of the whole township was 4439.

Miller swore that he was requested by some one to sign the petition, and did so, having read it and heard it read, but not all through, before signing: that he did not notice the offensive part at first, and when perceived, that he regretted having attached his name to it: that dissatisfaction had been expressed touching the Court of Requests, which influenced witness in signing the complaint, and not the place of holding the court. He had heard of many cases terminating unjustly, and had heard one Brown complain of injury. He had attended the court once at Galt, when Shade, Dixon and others were acting, and thought he had seen Murray and plaintiff acting alone, but observed nothing improper in their conduct.

David Coke said that he had heard defendant speak of the petition, and upon the witness expressing his apprehension that many who signed it would be prosecuted, the defendant replied they might prosecute him and be damned. The neighborhood of Saint George, where plaintiff lives, is as populous as other parts of the township except Galt. Witness did not think there was a general dissatisfaction at the place where the court was held, and supposed the real object was to get it changed, and had heard many say they signed it for that purpose, [Note—The rivalry alleged was between St. George and Galt]; and the witness said St. George was as near the centre of the township as Galt: that he had attended the court, and heard complaints from those who lost their suits. At the time of the trial of this cause the court was holden at Galt and for a month previous. The witness, on cross-examination, said he was a



bailiff, and had managed the suits of parties so far as to pay the fees: that at the trial the suitors generally attended, but in the outset many notes were sent to the clerk to be sued. The witness said he was always sworn generally at the beginning of the court by a general oath, to answer all questions asked of him and not in each suit: that plaintiff and Murray were generally present, and sometimes other commissioners. Witness never heard any complaint of the manner in which he was sworn to prove summons, &c. The witness added, that under the general oath spoken of, he sometimes proved what defendant said upon the service of process, as admissions of the demand.

David McLaughlin said he never saw the petition, but that Dickson the assessor wrote it, who told witness it was a petition for making roads, and the witness authorised him to sign it. He had heard no complaints against the commissioners.

Eli Smith said the petition was brought to him by Dickson the assessor, and that he signed it: that Dickson said its object was to get the court divided between Galt and Paris and St. George; to have the clerk's fees tariffed. Witness had no complaint, but he heard the commissioners complained of.

John McPherson said the petition was brought to him by Dickson, and that he signed it, but did not read it, supposing it must be right as Dickson brought it. He did not tell witness he was a hired agent. Witness knew nothing and had heard no complaint against the commissioners, but understood the object was to correct the exaction of unlawful fees. Dickson said it would be doing public good, and witness yielded.

John Smith said he was a commissioner of the Court of Requests, and had acted with plaintiff and Chapman. He did not sign the petition and would not, not thinking it true: that a good deal of the business came from Paris, and that St. George was as convenient as Galt: that defendant lives at Galt, which is further from Paris than St. George is. It was at first arranged to hold the court at each of those places in succession, to which the plaintiff did not object: that the



commissioners received 2s. on each judgment, and the clerk 6d. for a summons, and 6d. for the copy when made, charged to the plaintiff, alike whether he succeeded in the suit or lost it. Witness knew of no charge being made for calculating interest, but the clerk charged for drawing out the account of plaintiff's demand, which he paid for if he desired the clerk to prepare it. It was not an item of costs officially before the commissioners. The witness said he had not been accused of taking excessive fees; that he had not offered to restore any to one Bradish. He admitted that the bailiff might have acted as agent in collecting undefended notes, but did know of his being allowed fees as a witness: that the act required plaintiffs to follow their debtors into the division in which they lived, and that it was a very usual practice for notes to be sent to the clerk or others to be collected, and the witness saw no moral impropriety in the bailiff being employed to collect such debts.

On the defence a non-suit was moved for, on the ground that the petition, signed by 200 people, in itself establishes the *bona fides* of the parties or rebutted the idea of malice—that it carried its own antidote, and was manifestly, upon inspection, a privileged communication. A non-suit was declined, and the case proceeded.

John Carter said he lived in Dumfries, was a commissioner of the court recently appointed: that he previously attended the sittings casually: that the business seemed to be conducted on proper principles, and the commissioners anxious to get at justice, and consequently heard much extraneous matter, which led to confusion: that he had seen the bailiff examined, as to admissions by defendants, without being sworn; being first interrogated as to the service of the summons, and then the admissions of the parties; a practice which had been overruled by the new court: that the plaintiff was desirous of adhering to the old course, as most convenient to the public. It was also proposed that the clerk might be allowed to collect debts, and refused; and that the clerk and bailiff had been previously in the habit of acting as agents.



John Brown said he lived at Galt, had attended the court there, at first composed of four commissioners, including the plaintiff: that the witness had a suit, and considered it unjustly decided. He produced the summons, particulars and judgments. He said there was a general dissatisfaction with the judgments of the court: that he complained to the government about his case, and was a signer to the petition, and procured a number of other names to it: that defendant had said nothing to the witness: that some people complained of having experienced injustice, and others relied upon the representations of their neighbours: that two persons declined signing, and that it must have been known the petition was going round. On cross-examination the witness said his complaint was—that the commissioners allowed a year's interest before the debt was proved to have been contracted, and that he had not paid it: that they would not accept a set off the plaintiff was willing to allow, and that he had given notice of set off after an adjournment of the suit; but had heard no objection to the want of previous notice, as a reason of the commissioners for rejecting evidence in proof of it.

Robert Ballincourt said he was a commissioner, and had discontinued sitting in the court, owing to a want of cordiality in the board: that it was suggested at the first court that the clerk should have double fees—that is, 6*d.* for the summons, and 6*d.* for a copy. The witness heard reports to the prejudice of the court after he left it, but imputed nothing of himself.

Joseph S. Simmons said he lived at Galt, had paid 6*d.* for a copy of a summons, and heard complaints of the court.

Jas. Smith said he paid 6*d.* for a copy of summons, and 3*d.* for computing interest, paid to W. Murray, a commissioner, for the clerk: that he had paid 1*s.* 3*d.* for each one of four services, (the court understood as a plaintiff).

Hiram Capel said the people were generally dissatisfied with the Court of Requests.

Joseph Brennan said there was a complaint of Mr. Murray, as being a partial man; but people spoke well of plaintiff, saying he would do well enough if it were not for



Murray : that a petition had been in hand before the present, but fell to the ground, owing to the cholera : that he heard plaintiff say he would prosecute for his character : that witness signed one petition not sent to government, but withheld his name latterly, for fear of being instrumental in moving the court from St. George to Galt, or of hurting plaintiff : the old petition had six or eight signatures.

Thomas Rich said he had seen the petition : that the people (poor people) were dissatisfied with the court, and wished to apply for the removal of the commissioners : that the cholera broke out, and put a stop to it ; afterwards that witness got another drawn out more formally, and cheerfully signed it, thinking the people were aggrieved : that he never applied for the clerkship, and would not accept it.

In reply—James Barraclough said he was the person who had sued Brown : that he saw no injustice : that the commissioners did not refuse to hear the case : that they did justice, but witness had not been paid the debt.

Macaulay, J. charged the jury that the petition appeared to him to be a privileged communication, and that there was no sufficient evidence of malice in the defendant : that (if requisite) color was given for the complaint by the evidence heard, and that in itself, it was manifestly supported by a great number of petitioners : that there was no ground to presume a combination among so many to misrepresent the plaintiff, or that they had been duped through the instrumentality of the defendant in so doing, without any cause ; but, on the contrary, that many appeared to be voluntary parties, acting for themselves—at least, the contrary was not shewn : that it was an appeal for redress in a public matter, addressed to a quarter capable of granting relief, and that it appeared to him to be protected under the right and privilege of petition for redress of grievances, upon a lawful and proper occasion : that he would not say no action could be sustained if a particular individual were clearly shewn to have acted *malâ fide* corruptly and with sinister views, and, in such a spirit, promulgated and promoted a petition of the kind, ostensibly for a legitimate object, but in reality for the gratification of animosity or



other selfish ends; but that in cases of public petition to either house of parliament or to the king, he was disposed to think, that being presented to the proper tribunal or jurisdiction to receive any such representations and relieve against any such grievance as might be complained of, the communication would be privileged and not actionable in a civil suit for libel, although in fact malicious on the part of some who signed it; and that, in the present case, even if malicious on the part of the defendant, he was inclined to deem it nevertheless privileged, as a petition to the proper place invoking inquiries and redress of the public grievances stated to exist. Upon the case, as in evidence, he recommended the jury to find for the defendant, and they did so; but he could not say that, in his observations, he withdrew from them the right to find for the plaintiff, if satisfied the defendant's conduct had been malicious and causeless. He thought the evidence did not go sufficiently far to prove it such; but his own impression was, that with discouraging remarks he did leave it open to them to find for the plaintiff, if satisfied that the defendant was actuated purely by malice, under pretence of public good, and not honestly in seeking relief on what he thought afforded just ground of complaint. If the case ought to have been thus gravely submitted to them as an open question, inviting and entitled to their serious consideration, on the ground of its being equivocal and balancing in the evidence, he admitted he did not leave it to them in the form he ought to have done—that is, if in point of law the action would be sustainable against the defendant upon this occasion, provided he was actuated by malice.

The jury found for the defendant.

*Draper*, in Michaelmas term, obtained a rule nisi for a new trial, on the ground of misdirection. The *Solicitor General* shewed cause. Judgment was given this day.

ROBINSON, C. J.—Upon the facts of this case, as they appeared in evidence at the trial, and upon the report made by the learned judge of his charge to the jury, I am of opinion that the verdict should not be set aside. It is true that the charge made against the plaintiff and the other



commissioners of the Court of Requests—"That their proceedings, in the exercise of the important functions conferred upon them, had been fraught with the greatest partiality and injustice"—is highly defamatory, and that the petition which contains it bears in this passage certainly, and perhaps in others, the character of a libel, so far as we regard the language merely; but this language was used in a petition addressed to the Lieutenant Governor of this province, signed by this defendant as one of two hundred or more whose names were attached to it, setting forth facts, which, if true, were public grievances for which redress could have been obtained through the intervention of his Excellency the Lieutenant Governor.

The declaration in the celebrated Bill of Rights has been relied on by the defendant. That declaration—"That it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitions are illegal;" and it is relied upon, not without reason, as a solemn recognition by the highest authority of a principle of the law, which certainly applies to the case before us. The governor, to be sure, is not the king, and we cannot apply the principle literally and in terms, but in spirit it is applicable. This petition was addressed to him, as acting for and in the name of the king, and it prayed him to exercise an authority for the redress of alleged grievances, which it was competent for him to exercise, because he was in this instance clothed with the authority of the sovereign. Such being the fact, there is much to be found in the books to lead us to the conclusion that in this case the presumption of want of malice is conclusive in favor of the defendant, which amounts to saying that his motives are not to be questioned in a civil or criminal court. With regard to petitions addressed to either house of parliament, the doctrine is maintained in strong terms, and the reasonableness of it is vindicated—first, from the necessity of allowing freedom of action in this respect; and, secondly, from the consideration that in case of an abuse of a privilege which must be allowed to be exercised in the first instance without restraint, the body to which the statement is addressed



is able, and, it is to be presumed, will be inclined promptly to punish the abuse. I confess that I do not see that the latter consideration applies in the case of the king, or of the head of the executive government here, because there can be no corresponding proceeding for a contempt, such as either house of parliament might adopt. It is, to be sure, in the power of the crown to direct a prosecution in the criminal courts, but such a prosecution would involve the question, whether the petition was in law a libel; and that it would be competent to the crown to make the petition a libel or not a libel, by directing or forbearing to direct a prosecution, can scarcely be maintained. Nevertheless, the ground upon which the principle rests applies, in my opinion, as well to petitions addressed to the head of the executive government as to either of the other branches of the legislature; the same necessity exists, the same common good is involved, and if the same summary means of punishing any flagrant abuse of the privilege does not exist in one case as the other, there is notwithstanding no warrant for holding that the cases do not come within the same rule.

Whether in the case of a petition to the king or the lieutenant governor, or even in the case of a petition to either of the houses of the legislature, the privilege is so absolute that the conclusion in favor of the defendant is incapable of being repelled, may admit of doubt. Evidence of malice, coupled with a knowledge that the statements were false, or the inference of malice, arising from the certain consciousness on the part of the defendants that the statements were false, may perhaps constitute so clear a case of a flagrant and intentional abuse of the right of petitioning, as to give the injured party a claim to legal redress. The language of the court in the case of *Fairman v. Ives* (5 B. & A. 642) supports this position, and it is consistent with reason. But if in any such case an action for libel could be supported, which I doubt, the case must be extreme, the proof clear, and the abuse manifest.

On a careful consideration of the evidence given in this case, and without entertaining any presumption unfavorable



to the character of the plaintiff, (whose conduct it was the business of the government upon this complaint to investigate), I see nothing that would, in my opinion, have warranted the jury in treating the defendant, or the other signers of the petition, as the authors or publishers of a malicious libel; and, I think, if a verdict had been rendered for the plaintiff, on this evidence, we should have found ourselves called upon, in the exercise of a sound discretion, to set it aside.

If the learned judge had told the jury at the trial that any charge, however foul or false, might, under any circumstances, be stated in a petition to the lieutenant governor with impunity—by which I mean without liability to punishment by any legal proceeding—I should not, I think, concur in such an opinion; but it does not appear that the jury were so instructed. The utmost that can be said is, that the jury were informed that in this view of the court there was no sufficient pretence for this action: that the defendant was entitled to their verdict, and that to give damages to the plaintiff in such a case as that before them would be wrong. I agree in that view; and to have dwelt in this case upon any supposed circumstances which might in other cases enable a plaintiff to recover, was not called for, I think, by anything that appeared in evidence.

It is very true that the plaintiff and his brother commissioner may have been very unfairly traduced by the petitioners through ignorance, prejudice or heedlessness, and perhaps from malice; but this is an evil for which there is not always a remedy, and the facts which might perhaps entitle a party in some such case to redress do not appear in this case. Petitioning is so far protected, I think, that the presumption is, the party believed the grievance to exist which he stated, and is not liable to be called upon to account before a jury for his grounds of belief.

Perhaps a plaintiff may be received to give such evidence as will shew this complaint false, a knowledge that it was false, and a malicious motive.

SHERWOOD, J.—I incline to think the petition mentioned in the declaration in this cause stands upon the same footing



as petitions to the king or to any of his ministers, complaining of the conduct of an officer or magistrate in the execution of his duty, because the commissioners of the Court of Requests hold their places by an act of the provincial legislature during the pleasure of the lieutenant governor, and may be removed from their office by him. The power of removal must necessarily include the right of previous enquiry into the circumstances of the case, otherwise justice could not be done; and therefore the petition, being addressed to a person possessing the power of enquiry and relief, and acting for the king, must be entitled to the same privilege as if addressed to the king himself. Petitions to the crown may be classed under two heads—1st. Such as complain of some public and general grievance; 2nd. Such as arraign the conduct of individuals and pray satisfaction for alleged injuries, or the prevention of them in future. The petition now in question is clearly of the latter description. It appeared by the evidence given at the trial that the defendant signed a memorial to the late lieutenant governor Sir J. Colborne, complaining of the conduct of the plaintiff and one Murray, in the discharge of their duty as commissioners of the Court of Requests. The defendant employed a man and paid him for his services to carry the petition from house to house in the township where he resided, for the purpose of obtaining signatures, and by this means the names of more than two hundred persons were obtained as subscribers, (vide the petition, ante 211). Very few charges of a more serious nature than those of partiality and injustice could possibly be brought against an individual holding a judicial office, and still the defendant adduced no evidence at the trial to shew a single instance of either in the plaintiff. He did not prove that either he or any other subscriber of the petition had suffered injustice at the hands of the plaintiff, or that he had injured any person while acting as commissioner of the Court of Requests. There was nothing appeared upon the investigation to justify the writing and circulating a petition of the nature which the defendant caused to be circulated so publicly against the plaintiff, but the defendant insisted on his right



to petition, and rested his defence on the ground of privilege. On the argument in banc. his counsel pursued the same line of defence, insisting that the defendant had a legal right to petition the lieutenant governor in the way he did, and contending that no action at law could be sustained for any defamatory matter which the petition contained. I think petitions to the king or to any of his ministers, complaining of the conduct of an individual, and containing defamatory statements against him, are or are not privileged communications, according to the motives and intention of the petitioner in making them. If he fairly and honestly makes statements in such petitions, prejudicial to any person's character, but which he believes to be true, and which are made for the real purpose of obtaining redress of what he really considers an injury or abuse, his petition is privileged. If he falsely and maliciously prefers a scandalous charge against the individual in such a petition, with the intention of committing an injury instead of seeking redress, then, in my opinion, his petition is not privileged. I think the legal presumption is always in favor of the petitioner that he acts fairly and honestly, unless the circumstances of the case afford some evidence of an evil and malicious intention, in which case the question of privilege is a fact for the jury to determine under the direction of the court. In some cases the presumption of privilege is altogether conclusive, and the law will not allow any evidence to be adduced to remove it, or at all to impeach it. The regular and established proceedings in parliament and in courts of justice are of this character, and no action like the present can be supported upon any part of their contents. The reasons given for this absolute privilege are—1st. That the safety and welfare of the community requires that all such public proceedings should be perfectly unrestrained and free, and only subject to the authority and discretion of the tribunals in which they take place; 2nd. That such tribunals possess the power of expunging all defamatory matter if irrelevant from the proceedings, and of obliging the offending party to make satisfaction. The king does not possess the same power of giving redress for injuries as his



parliament and courts of justice do, and therefore petitions to the crown against private persons or magistrates ought not, in reason, to be so far privileged as that no action could ever be sustained upon them under any circumstances; for, if that were the law, there might be a great injury without a remedy. This would be contrary to the general principles of the common law. I have not been able to find many cases which relate to this subject; there is an old case, *Hare v. Miller* (Sid. 415; 1 Leon. 138, 163). That was an action on the case for defamation, brought in the Court of Common Pleas in the reign of Elizabeth, in which the plaintiff declared—"That the defendant had exhibited unto the queen a slanderous bill against the plaintiff, charging him to have recovered against the defendant 400*l.* by forgery, perjury and cozenage." In this case it was said by the court—"That the exhibition of the bill to the queen is not in itself any cause of action, for the queen is the head and fountain of justice." This remark of the court was rather incidental than determinate, because the judgment of the court was given on another ground—namely, that the bill contained no specific charge against the plaintiff of any offence whatever, for there might have been forgery, perjury and cozenage without his knowledge. At all events, the remark can amount to no more than this, that the mere act of the defendant in preferring his petition to the queen was not *prima facie*, and by itself, such a publication as the law would deem libellous; but the court did not go the length of determining that no action would lie under any circumstances for slanderous matter contained in a petition to the queen. In *Robinson v. May* (2 Smith, 3) the declaration charged the defendant with publishing a libel against the plaintiff. It was proved at the trial that the defendant wrote a letter to the Lords Commissioners of the Admiralty, in which he stated that the plaintiff had taken upon himself to grant protection to certain masters of vessels—that he was, in fact, not a magistrate for the seaport town, and possessed no power to grant protection, and that his conduct was injurious to his majesty's service. The admiralty board sent immediately to enquire into the fact, but, finding



the charge was unfounded, gave up the letter of the defendant, and directed an action to be brought. At the trial the defendant's counsel insisted the plaintiff had not proved a malicious publication, since it was only a confidential communication to a proper officer, and there was no proof of further publication. Lord Ellenborough said to the jury that it might be considered the defendant's duty to write to the admiralty. It was the duty of every person to communicate to his Majesty's servants every circumstance which might be prejudicial to his Majesty's service, but, as to the question of malicious publication or not, it was entirely with the jury; and the absence of all ground for the representation was sufficient proof of malice, when no excuse was proved on the part of the defendant. The case of *Fairman v. Ives* (1 D. & R. 252), I think, is analogous in principle to the present case. The libel declared upon arose out of a memorial addressed by the defendant, a wine merchant, to Lord Viscount Palmerston, secretary at war, complaining of the conduct of the plaintiff, a half-pay officer, and alleging that he had unjustly and unfairly deprived the memorialist of redress in the payment of certain bills of exchange, accepted by the plaintiff, payable at a banking house where the plaintiff had no cash to meet the payment when the bills were at maturity, and praying his lordship's interference in the matter, to obtain justice for the memorialist. The defendant pleaded not guilty; and at the trial proved the plaintiff did not reside in Surry-street No. 6, where the bills were addressed: that he had kept out of the way, and his place of residence could not be found for several months; and that he had no cash balance in his favor at the bankers when the bills fell due. It appeared however that his address might have been known by enquiry at his army-agents, Messrs. Cox & Greenwood. Upon this evidence the case was left to the jury; and Abbott, Chief Justice, afterwards, in reporting the case in term upon an application for a new trial, said, "I left this case to the jury on the fairness and honesty of the defendant's intention in the course he had adopted. This being a letter written by the defendant to Lord Palmerston, it was in the form of



a petition, asking him for his interference to enable him to recover the money, which, upon the evidence in the cause, was undoubtedly due, I told the jury if they thought the representation was a fair and honest statement of the real facts, as far as the defendant could understand them, this was a sort of communication he was authorised to make. I told them however, that if they thought the defendant had gone beyond the line, and, not merely contented himself with a statement of facts, had used expressions not warranted by the occasion, the case would be otherwise. I directed their attention to the words 'unjustly' and 'unfairly,' and also to the other strong expressions in the memorial, but I still left it to them in this way, that if they thought it contained a fair, true and honest representation of facts, according to the understanding and opinion of the writer at the time he was writing, he was justified in the publication of this memorial, by way of petition to the Secretary at War, praying interference on his behalf." The case was left entirely upon the fairness and honesty of the defendant's intention.

Best, J., among other remarks, said, "This case was very properly left to the jury. For the purpose of ascertaining whether a publication is libellous or not, we are to look to the circumstances under which it is published. If the defendant, in a memorial to the Secretary at War, had reflected on the character of an officer who owed him nothing, he might justly be called upon to answer for a libel, because no man has a right to make a charge against another without any foundation, but a person has a right to appeal to such a tribunal as he thinks will afford him justice, in a case where he has to complain of an injury."

I have already remarked, that proceedings in parliament and in courts of justice are so entirely privileged that no action for libel will lie for either under any circumstances whatever, and no other kind of action will lie for any publication in parliament. An action for malicious prosecution or malicious arrest, however, will lie for groundless and oppressive proceedings in courts of common law. The Bill of Rights (1 W. & M. stat. 2) declares that no proceeding



in parliament shall be impeached or questioned in any court or place out of parliament. For anything therefore which is said or done in parliament, redress must be sought there, if the person conceiving himself injured is inclined to seek for redress anywhere. The defendant in this case also contends that he is equally protected from any prosecution or action by the same Bill of Rights: that one subject has a right to petition the crown or its representative in this province against a fellow-subject, and to make any statement in his petition without danger of having his motive questioned before any tribunal: that the complaint against his neighbor, contained in his petition, may be false, malicious and scandalous, and that he himself may, at the same time, be blameless in contemplation of law. That part of the Bill of Rights to which the defendant alludes is in the following words:—"That it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitions are illegal." This declaration, in my opinion, was intended for the protection of petitioners applying to the crown for the redress of some supposed grievance of a public and general character, and which is thought to be occasioned by some existing law, order in council, proclamation or other act of the government, or of any department of government, but not a petition by one individual against another. The whole scope and spirit of the Bill of Rights points to public and political rights. Private rights were left to the protection, and private injuries to the discretion, of the common law, or to such other laws as might be made by parliament in the ordinary course of legislation. The Bill of Rights originated in the tyrannical manner in which James II. treated the petitions from the Universities of Oxford and Cambridge, as well as the seven Bishops who addressed him on the subject of the established religion in England. This is my view of the subject. And the Bill of Rights has no bearing on the present question; which, I think, should be decided according to the principles of those cases already cited and others of a similar character, where the jury are to determine on the motives of the defendant. If they find he acted



*bona fide*, although erroneously and without sufficient grounds, it appears to me the case is privileged; but if they find he acted unfairly, dishonestly and without probable cause, then, I think, they may and ought to infer malice, and find for the plaintiff. I can perceive no substantial difference between petitions against an individual addressed to the king or to the king's ministers of state, because they can act only in the name and by the authority of his majesty.

If however there be a legal distinction between a petition addressed to the king and one addressed to his ministers, charging an individual officer or magistrate with criminal conduct, and if the Bill of Rights makes all petitions to the king equally privileged, as regular proceedings in parliament, still it would remain a question whether the petition in this case be so privileged. It is not a petition to his majesty but to the lieutenant governor of a province, and upon a subject unconnected with any proceedings in the provincial legislature. The petition is not therefore embraced by the express terms of the statute; and I incline to think it must be considered in the same light as a petition to the king's ministers, if in point of law a difference does really exist between a petition to the king and to his ministers, when a charge against the character of an individual is preferred. Viewing the case in any light, it appears to me the present action may be sustained; and if my learned brothers were inclined to send this case to a second jury I should cheerfully consent, for I rather think the facts and circumstances of the case would warrant a verdict for the plaintiff. Whether a case like this is privileged or not, in my opinion, is a question for the court and jury to determine, in the same way as the Court of Common Pleas suggested in the case of *Blackburn v. Blackburn* (4 Bing. 395), and upon the same principle recognised in the case of *Pitt v. Donovan* (1 M. & S. 639)—namely, upon the *bona fides* of the communication. The last cases are similar in principles to the others which I first cited.

MACAULAY, J.—At the trial I understood the alleged libellous publication to consist, not in the defendant having requested Dickson to go round and solicit subscriptions,



though proved, with a view to the establishment of malice, but, a fact which was assumed on both sides, rather than proved by the plaintiff, (for there was no evidence to shew that it was ever placed in the possession of the lieutenant governor or how it came to the plaintiff's hands), in the defendant having signed amongst the first subscribing the petition in question, and presented or concurred in its presentment and delivery to his excellency the lieutenant governor, to whom it was addressed, and which it was contended becomes actionable in this shape, if the contents be false and the defendant was actuated by malice, or at least unless he shewed reasonable and probable cause for believing or making the representations set forth in the complaint. Noticing that it is a petition signed by several hundred persons residing in the township of Dumfries against some of the commissioners of the Court of Requests appointed for that township, including the defendant, that such commissioners are appointed by the lieutenant governor, removable at pleasure, and that the applicants invoked inquiry and implored relief, I need not add that the right of the subject to petition the king or his representative for redress of public grievances is materially involved in this proceeding. Of this right it was said by Sir James Mansfield, Solicitor General, on the trial of Lord George Gordon for high treason, that "the right to petition parliament no man had ever doubted;" but a contrary sentiment at times prevailed touching the same right in addressing the king, as was manifested in the case of the seven Bishops and many others, in consequence of which it was by the Bill of Rights (apparently to place both descriptions of petitions on a similar footing) declared that it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitioning are illegal. Commitments were prohibited, in allusion to the commitment of the seven bishops by the king and council, as observed by Lord Mansfield in the same trial, (21 Howell, 646), and prosecutions would seem to comprehend suits civil as well as criminal, in all cases within the act; for generally wherever a civil prosecution lies for libel, an indictment may be sup-



ported, although criminal prosecutions may be instituted when (no party being named or concerned) no individual could assert any civil remedy. In petitions to the king, therefore, it is always necessary to bear in mind the declaration of the ancient and undoubted right of the subject to be exercised on certain occasions, subject to the provisions of the 13 Car. II. st. 1, ch. 5, (held not repealed or altered by the Bill of Rights, Doug. 592) prohibiting not more than twenty signatures to any petition to the king in parliament for any alteration in matters established by law in church or state, unless previously approved as therein mentioned, also forbidding the presentation thereof by large bodies of people, but which, at the conclusion, recognises the general right of petition. This statute does not in terms apply to a petition of the kind before us, and in modern times its provisions are little observed, having become the less material from the orderly and decorous course usually pursued on such occasions in times of tranquility. It is manifest that the Bill of Rights is general and unqualified in its language and comprehensive enough in its terms to protect all petitions to the throne, and it would not seem contemplated, that any petitions thereby tolerated should form the subject of prosecution; for if by reason of calumnious epithets or reprehensible expressions or sentiments, or the want of *bona fides* in the signers or some of them, on any occasion, such occasion should be deemed an exception to the general rule, it follows that in every instance and in the case of every individual, or of all of them, it might be referred to a jury to determine whether the party was actuated by malice, or had, with unwarranted freedom, transgressed the bounds of moderation and decorum, and exceeded those limits which were lawful or which the occasion or subject matter required or justified. My present impression is, that a degree of impunity is granted in all cases within the protection of the act, and that, if liable to restriction, at all events it includes all public petitions for redress of grievances, whether they respect public measures or the conduct of public officers; consequently that it covers the present petition, which is a complaint by persons interested against



judicial functionaries in matters relating to their offices and public duties; and, I think, upon the face of the document and from the evidence, it may, as a matter of law, be pronounced so privileged. The following cases shew many instances in which, previous to the Bill of Rights, petitions to the king had been treated as criminal offences or contempts, and the parties punished as for libels or malicious and false proceedings, and present some of the reasons that rendered expedient and induced the Bill of Rights:—18 Ed. I., Rot. p. 3; Rot. 151, 18 Ed. III.; 19 Ass. pl. 3; 13 R. II., Rot. p. 45; Mich. 13 Eliz. Rot. 39; 19 H. VIII.; 8 El. 10; 7 St. Trials, 102; Poph. 135; Hob. 220; 15 Vin. Ab. 89; Cro. Car. 175; 12 Howell St. Tri. 183 to 500; Cro. Jac. 37; Moore, 756; Noy, 101. The statute 13 Car. II. afterwards provided against tumultuous petitioning, and the Bill of Rights obviated the effect of such principles as these cases contain, so far as they tended to impose undue or injurious restraint upon the right of petition to the king. I have not been able to discover instances of any such criminal proceedings against petitions to the king since the Bill of Rights, as had previously been practised. I find no instances of civil suits, as for libels, either before or after. Although the Bill of Rights is strong and complete, touching the general right of petition, still it may perhaps be questioned whether the undoubted privilege thereby declared is not confined more especially to public affairs and measures of government or criminal prosecutions solely, without withdrawing any protection (if any) by civil action, previously open to public servants or private individuals, when in that way (under cloak and pretence of seeking justice) wantonly calumniated. Against such it seems ever to have been held justifiable to complain *bona fide* upon reasonable or good grounds, in decent and becoming terms. When such accusations proceed from malice and want of foundation or probable cause, persons aggrieved seek redress by civil process, the form of remedy, if any subsists, then becoming material. It is not essential that I should deliver at present any more absolute expression of opinion on the subject than this case calls for, and to such a case it is restricted.



Indeed, conscious of the imperfect knowledge I have been able to acquire on this important subject, from the imperfect sources of information within my reach, I should not desire to venture unnecessarily any *obiter dicta* not called for by the occasion. It appears to me that the present is one of those petitions contemplated in the Bill of Rights, and entitled to whatever protection is thereby afforded: it follows that, as at present advised, I do not think this action of libel lies, even admitting that in some other shape a public officer, unjustly accused and traduced, may have a civil remedy. I however am not prepared to say that, if privileged by the Bill of Rights, any such remedy is open; and if not, the party is in no worse circumstances than in ordinary courts of justice, where no action lies for any calumny uttered or written in the course of judicial proceedings. If guilty, the end justifies the measure; if innocent, an honorable acquittal affords the satisfaction of triumph. There is another ground upon which, after the best consideration I have as yet been able to give the subject, I think this action fails—namely, that it is a petition from a number of the inhabitants of a township complaining, in a matter in which they are as such interested, against public officers, to the proper quarter—to the head of the executive government, (who is able to afford relief by removing the parties, if found culpable, or of directing ulterior criminal proceedings through the attorney general, if deemed expedient), and a proceeding quasi judicial in a court of justice; and this, although for misdemeanor in office, the persons complained against might be also subjected to a prosecution by information or indictment, or even summary punishment, by attachment in this court. In this point of view, I do not say the plaintiff is without remedy, or that, after a decision in his favor, he might not institute an action on the case for a malicious misrepresentation without probable cause, if placed in possession of the petition to produce in court upon the trial, for it would of course always be discretionary with the lieutenant governor to give up or withhold the instrument, a fact that is not without weight, as an argument in support of the



conclusion to which I have arrived. In such a proceeding, however, the plaintiff would be bound to prove malice and the want of probable cause, not malice and the falsity of the charge only; that would not do, unless he could also shew a want of reasonable cause. To support the case, malice and the want of cause must concur; if either be rebutted, it would fail; and I dare say, that in the petition before us it would be conceded that probable cause would justify the complaint, although malicious motives may have prompted it, so far as the defendant is concerned. I shall endeavor to shew, therefore, that if the plaintiff has a right of action as for a libel, probable cause alone (if not even the truth) would constitute no defence in bar under the general issue, however sufficient to repel any inference of malice or in mitigation of damages, when admissible in proof, should malice express be nevertheless proved; and we can easily conceive, that although true or probable, a representation may nevertheless proceed from malice.

It is said that in slander (including libel) malice is the gist of the action, as consisting of a false and malicious action: that in ordinary cases a calumnious publication is, if proved under the general issue, presumed to be false, and, if false, the malice in law is inferred; also, that if alleged to be false, it is sufficient, though the averment of malice be omitted; but it will be found in a privileged case that malice must be alleged and proved, and that if in the declaration it appeared to be privileged, the omission to allege malice would be fatal on demurrer; its being merely false would be insufficient.—Owen, 51; Noy, 35; 4 B. & C. 247; Style, 392; 10 B. & C. 266. The reason is, that the only distinction between privileged and non-privileged cases is, that in the one malice is inferred or presumed, while in the other it is in issue and must be proved to the satisfaction of a jury, and is not inferred from the mere circumstance of calumny, and this by reason of the occasion. In all other respects, I apprehend both descriptions of libel rest on like grounds. In criminal cases the truth is never allowed to be pleaded or proved as a defence in bar; when therefore in such proceedings a communica-



tion is claimed to be privileged, evidence of the truth or of the existence of a reasonable cause must be admissible, not as a defence in bar, but merely as evidence to go to the jury to rebut a malicious intent. In ordinary civil cases formerly, the truth was allowed to be proved under the general issue in cases of verbal slander (and equally perhaps if written), in bar of the action or in mitigation of damages; but it was ultimately decided that such defence should be pleaded, since which the truth is only admissible in bar when so pleaded; and facts shewing probable cause can only be received in mitigation of damages, (for nothing short of the truth will be a bar); when the truth is pleaded, then they can be received as tending to prove the truth, and though they fall short of it, they are with the jury to reduce damages—Willis, 20-4; Str. 1200; 5 B. & A. 645; D. & R. N. P. C. 10. Under the general issue, surmises &c. may be proved in mitigation of damages, by repelling malignity, and so weakening the implied malice, also because they could not form ingredients of evidence tending to support a plea of the truth, as the grounds of probable cause would; but probable cause—that is, facts and circumstances shewing the ground of such cause—are not admissible in mitigation of damages under the general issue. Again, when the truth is pleaded the malice, *quoad* that plea, stands admitted, and the issue is proved not to rebut malice, but as justifying the aspersion, notwithstanding the malice; and herein consists the difference as to the object and effect between the proof of the truth, under a plea in an ordinary case or under the general issue in one that is privileged; in the former it is a justification however malicious, in the latter it is evidence only to rebut malice; for in the latter (I take it) if malice be shewn, although the truth be proved, the truth is then no bar unless pleaded, and need not be found by the jury; and, though it may mitigate damages, probable cause only would clearly be no bar under the general issue if malice was proved, as it would be no defence if specially pleaded—4 B. & A. 613; 10 B. & C. 266; 2 Bing. N. S. 372. Probable cause will not justify an ordinary slander, nor will the occasion excuse the



publisher on that ground, if his motives be malicious and not *bona fide*. In cases where the occasion justifies the communication malice must be proved, and the truth or probable cause are evidence to rebut it, admissible under the general issue—in other words, the whole matter is gone into under the general issue, not as excepted from the general rule laid down in Will. 20, (that the truth may be pleaded as a bar), but as evidence for the jury to rebut malice, who would be instructed to find against the defendant if he acted *mala fide* or maliciously—3 C. & P. 387. When the defendant is obliged in either case to rely upon the truth as a defence, acknowledging the malice, the occasion is no justification under the general issue; the truth must then be pleaded. I deem this an important point to be established, material at all times in suits of this kind, and not apparently the view taken by all the English judges, although I think reason and the weight of authority in favor of it. If my idea be correct, it will at once be seen that whenever the existence of probable cause or even the truth, though malice exist also, would, by themselves, be a valid defence, the publication cannot be treated as a libel; indeed the substantial distinction between this action and case for a malicious prosecution is, that in the latter, either probable cause or the want of malice is a bar, while in the former, probable cause is no bar if malice be proved.

In many cases of a privileged character, though it is stated that in such instances a plaintiff must prove both the falsity and maliciousness of the charge, none say that if the falsity be established proof of a reasonable cause will excuse the defendant if the communication was malicious. It would rather seem that, if actuated by malice, it behoved him to be prepared to shew its truth—I would add, in that event, by pleading it; for I do not infer that those cases mean more than to call for proof of falsity from the plaintiff as evidence of malice in the defendant.

The learned judge then cited and remarked on the following cases:—Bull. N. P. 8; Cro. El. 520; 4 Burr. 2424; 1 T. R. 110; 3 B. & P. 587; 1 Camp. 267; 2 Smith 3; 5 B. & A. 642; 1 D. & R. 252; 1 B. & A. 267; 8 B. & C.



578; 3 M. & R. 101; 3 C. & P. 383; 5 C. & P. 543; 4 M. & R. 338; 9 B. & C. 403; 10 B. & C. 263; 4 B. & A. 700; 2 Ea. 426; 4 Bing. 395.

From a review of the whole I come to the conclusion that, in communications privileged by reason of the occasion, the truth must be pleaded as in ordinary cases, if express malice be shewn *aliunde*—in other words, that probable cause and the truth are not in any cases of slander a bar under the general issue, unless as evidence to the jury to rebut malice when material and in issue; and that cases may occur (though not likely to arise) where a communication may be true or founded in probable cause, and yet be imparted purely to defame and injure the party informed against. Hence it follows, that when the truth or probable cause may be proved as a bar under the general issue, although actual malice may be present, case for slander is not sustainable, but a special action on the case negating the existence of probable cause and malice, when both are put in issue under the plea of not guilty, because that which in an action of the latter description would be a valid defence, would be insufficient as a bar in slander. A little reflection suggests distinctions between various cases of privileged communications, and rules of evidence and forms of action may vary accordingly. All privileged communications are not equally and alike privileged. Some are cases of answers given to questions asked as characters of servants; others are volunteer representations of a similar kind; others are spontaneous confidential communications among friends, on whom a right or duty rests by reason of interest, or employment, or relationship, &c. and all between individuals touching private matters. Some are from private persons to the king or his officers, respecting private grievances; others emanate from individuals, but affect a party in some public office or duty, or are prompted by solicitude for the public good; others again are united representations from numbers of people touching the public conduct of public servants, addressed not to individuals but to the head of the executive government or parliament; to which may be added proceedings in courts of justice, and



the address of counsel to juries. Most of the cases in the books of civil actions arose out of communications between individuals, and distinctions seem to have been taken—

First. Between ordinary cases of slander and privileged communications ;

2ndly. Of the latter, between communications solicited and volunteered ;

3rdly. Between characters of servants and the like, and applications to public departments, which are spontaneous ;

4thly. Between cases of private applications respecting private claims ; and

5thly. Private claims against an officer on his private account, or arising out of his public situation ;

6thly. Also between representations for private relief, or a redress of public grievances ;

7thly. Between judicial proceedings in a course of justice, through courts legal, equitable or ecclesiastical, or parliament, and other privileged proceedings ;

8thly. Some being privileged *prima facie* only, others absolutely.

These and like points of difference should be borne in mind in applying cases to new facts. The books may be searched in vain for one precisely like the present. It is unlike the ordinary reported cases of privilege, being a public complaint against a public officer. The two approaching nearest to it in modern times are those in 2 Smith 3, and *Fairman v. Ives*. The former was an anonymous letter, and of course suspicious in itself and not entitled to be called a petition of the party, rather resembling a covert attack upon the plaintiff's reputation ; the latter was a memorial respecting a matter purely private between the plaintiff and defendant, and the secretary at war was only addressed as possessing a control over the plaintiff by reason of his office, to urge him to do private justice. It was not a petition to the king against him in his office ; and in neither of these cases was the absolute privilege, from being sued as for libel, claimed. No case asserts that such a claim would not be allowed, even in these circumstances ; and, if not, they are clearly distinguishable from the



present. In both of them the truth or reasonable cause was supposed sufficient to rebut malice; but, when malice appeared, as it did in one of them, the privilege was taken to be destroyed; and it might well be said, when any one wrote an anonymous letter against another, he should be prepared to prove his own *bona fides* or the contents true. An open application, invoking enquiry and offering to support it, is another thing. The anonymous letter was not a petition, and the memorial to Lord Palmerston may not be entitled to be so termed, in relation to the Bill of Rights. Private applications are usually styled memorials. Petitions are public acts, in which many express their wishes. The people petition the king or parliament, a private individual memorials the government or a public department of the state for personal objects. A perusal of the cases of ordinary privilege will shew that probable cause is not of itself a justification, other cases argue that at times it is a good defence, but then the action must be on the case as for a malicious proceeding. All cases of the latter kind may be grouped under the general head of communications or proceedings absolutely privileged—that is, whether true or false, malicious or in good faith, resting on grounds of public policy. If I have shewn that probable cause alone would be no sufficient defence, when malice is apparent, to uphold the claim of privilege in a case of libel, and if (as seems manifest) in a proceeding like that before us probable cause would warrant the petition, though some or all (which is an extreme case) of the signers were prompted by malice to prefer a charge which they believed to be well founded, then it follows that the presentation of such a petition is not a libellous publication. Before proceeding to shew that it is *quasi* judicial, in a course of justice, and on that account absolutely privileged, (though perhaps liable to be called in question in a collateral suit, as for a malicious complaint without reasonable cause), I would observe of the cases in the books, that where malice is in issue the internal contents of the document and the epithets used sometimes afford evidence of it (as in 2 Smith, 3); at other times they do not, as in *Child v. Affleck*; at other times



additional proof is added, as by shewing falsity, proving threats, animosity, &c. ; and the result seems to be, that if upon the face of it the occasion *prima facie* imparts privilege to the communication, a plaintiff must prove express malice, either by shewing the falsity of the charge or by other collateral circumstances, or from irrelevant, redundant or calumnious epithets contained in the instrument itself ; and when, though the occasion gives privilege, express malice is established, an action is sustainable, notwithstanding proof of its truth or of a probability for the charge. It follows that, if subject to be prosecuted as a libel, a petition of the present kind, couched in indecorous language, might constitute in itself a *prima facie* case to go to a jury, from which malice might be inferred without any extraneous evidence to shew the absence of truth or of a probable cause for the calumnious statements ; indeed, it will be found, as already stated, that a spontaneous communication to the prejudice of a person has been considered *prima facie* sufficient to call upon the defendant to shew it not malicious and so justifiable, without regard to its truth or the reasonableness of the cause. The effect of this doctrine, applied to the right of petition for redress of grievances when public officers are complained against, may be readily perceived. Supposing petitions to the king to be similar to ordinary privileged cases, or to memorials or applications touching private matters to the heads of public departments, against officers of government, and consequently actionable as libels, if malicious in fact, it may be asked what would be the course of evidence ? If a memorial was unexceptionable in its composition, however calumnious in its effect, would the onus rest upon the plaintiff to shew malice, falsity or the abuse of cause, or the defendant to rebut it, by reason of the voluntary nature of his appeal ? Or, should the petition be exceptionable in the manner as well as the matter, and contain redundant or irrelevant aspersions, unwarranted by the facts asserted and unnecessary to express them fully, would the case be altered by reason of the introduction of disparaging epithets, and would the cause of complaint in such a case contain internal evidence of malice to go to a



jury, as was held in 2 Smith, 3, where defendant adduced no evidence in exculpation?—(2 Burr. 811; 1 B. & P. 528.) In *Fairman v. Ives* the defendant proved the leading facts of his complaint on the defence, and we have seen the rule in cases between master and servant. It might further be asked, whether public petitions for redress of public grievances, containing complaints against public officers in the discharge of their official duties, would be subject to any different rule or course of evidence from applications of a private nature, though of doubtless privilege? An answer, asserting that the onus would be on the petitioner to prove a probable cause or a *bona fide* proceeding, could hardly be expected in any case ostensibly privileged as a petition for redress of a public wrong, until the party complained against had at least impugned the motives of the adversary and repelled the charges in general terms, yet any difference in the rules of evidence argues a difference also in the form of action; and, if it be conceded that probable cause would vindicate the petition in question, such concession would be a powerful argument to prove that it stands upon the same footing as petitions to parliament or judicial proceedings in courts of justice. It is not however to be overlooked that the case of *Child and Affleck* would shew the court warranted in determining how far the evidence in any instance makes a sufficient case to go to the jury, supposing the facts stated by the plaintiff's witnesses to be true, regard being had to the difference in the defence of proof required when the representation is volunteered or solicited. Touching the judicial character of the petition, it will be remembered that the plaintiff holds a judicial office during pleasure, removable by the lieutenant governor at discretion, and that, as such, he is complained against by the defendant and others, who invoke enquiry and pray for relief from the proper quarter—from one competent to afford it, by the effectual step of dismissal, and therefore authorised to institute such enquiries as may enable him to form a satisfactory decision upon the merits, and to remove or exonerate, according to the result. The privilege afforded in courts of justice is well known, and petitions to either house of par-



liament are equally protected, and similar reasons of policy and justice would seem equally to apply upon principle to petitions to the crown. It is true that the houses of parliament may punish as for a contempt slanderous calumnies in the shape of petitions, and that courts of justice may expunge from their records irrelevant or calumnious matter, and so obliterate it, and that formerly pledges were required in civil cases to guard against the abuse of vexatious and malicious suits; yet the latter has long been an obsolete practice, and the former is seldom resorted to. Such power in the parliament and courts, though it may lessen the evil, ineffectually redresses the party aggrieved, and does not constitute the principle on which an absolute privilege is allowed. It rests upon a higher and much broader ground. It is said in Starkie on Libel, 223, it may be collected, that no action can be maintained for anything said or otherwise published in the course of a judicial proceeding, criminal or civil, though for a malicious and groundless prosecution an action, and perhaps an indictment, may be supported on the whole proceeding.—Holt on Libel, 177. In such a case probable cause appearing would conclude the plaintiff, though malice was shewn, and though the subject matter was untrue in fact. Malice and want of probable cause must concur, and though the former might be inferred from the latter, yet it would not necessarily and inevitably follow; and should either fail to be established, the case would fail with it. In the face of the truth or reasonable cause, it might be difficult to shew *mala fides*, or to manifest a pure motive in their absence, but they are not identical or convertible terms; if they were, the books would not separate them as distinct ingredients, but say that probable cause shewn conclusively rebutted malice, or that proving it to be wanting, established the *mala fides*. It is, in truth, but evidence to sustain or repel the inference of malice. In civil suits, however wanton and vexatious, a party has no remedy beyond the recovery of costs. In criminal cases, after an acquittal, an action lies for a malicious prosecution, if malicious and without probable cause. In petitions to parliament there is no redress out of the house, at least not



without the sanction of that body, (waiving its privilege to protect, if it could be done), to the prejudice of the party ; and then not for a libel, but a false complaint, malicious and without cause. In regular petitions to the king, like the present, similar rules should, I think, govern, and no action be allowed until a favorable decision and the sanction of the government should have been obtained ; and then not as for a libel, but a malicious and unfounded aspersion, in the form and under the pretence of legitimate complaint.

It is unnecessary to multiply authorities, but I will notice the following :—12 Co. 103 ; Moore, 820 ; Rol. Ab. 87, Pl. 4 ; March, 20, 76, Pl. 119 ; 2 Burr. 811 ; Dyer, 285 ; 4 Co. 14 ; 3 Lev. 123 ; 4 Lev. 35 ; Noy, 102 ; Moore, 627 ; 1 Buls. 151, 185 ; Cro. Ed. 230–1, 247–8 ; Cro. Jac. 134, 191, 356, 432 ; Godb. 240, 340 ; 2 Buls. 269 ; 2 Inst. 228 ; 1 Ld. Ray. 341 ; 1 Sand. 131 ; 1 Lev. 240 ; 1 Sid. 214 ; 2 Keb. 361, 462, 496, 659, 801, 832 ; Hard. 40 ; 1 Mod. 58 ; Godb. 405, Pl. 480 ; March, 20, 107 ; Bac. Ab. Libel, 2 ; 21 Howell, St. Trials, 69 ; 3 Lev. 136, 163 ; 1 B. & P. 528 ; 5 B. & C. 648 ; 2 Com. Dig. 361 ; 2 Kent's Com. 18 ; 1 B. & A. 245, note ; 2 Stark. Ev. 874 ; 4 B. & C. 811 ; 6 D. & R. 528.

An investigation into the use and progress of our judicial establishments, as emanating from the crown, the source of justice and mercy, and of the use, origin and constitution of the high court of parliament, now consisting of three co-ordinate branches, of which the king is the head, would, I think, tend to strengthen (upon first principles) the argument that he may be approached, under privilege, with as much impunity as the courts or houses of parliament, so far as respects the right of the party complained against to call upon the petitioner to answer him *civiliter* in another place, for having published a libel by reason of his appeal to the crown. If the true principle for protecting parties before ordinary courts of justice and both houses of parliament is, that the proceedings are in a course of justice—as, I think, it is—I do not see upon what sound principle a petition to the king can fall under a different rule. It may be a contempt in law against the king or parliament or



courts of justice to prefer a false and calumnious complaint or suit of malice against another, and, as such, the offender may incur liability to penal correction, even in a summary way, at least by all three tribunals except the first mentioned. Yet that extends no substantial redress to the person injured and aggrieved; it is but punishment for the public or criminal offence, and the party cannot attribute to it, in a civil suit, the character of a libellous publication. Yet the king, though incompetent to punish by commitment for a contempt, might perhaps, in an aggravated case, direct proceedings for the satisfaction of public justice; and the want of power to commit or enforce punishment through any other medium would not prove the want of as ample privilege as in parliament—it would shew it to be greater. He is, in truth, the fountain of justice, and his courts dispense it in his name in behalf of the people; and if, to allow free access to all other springs of justice, such a privilege prevail, it ought, by parity of reasoning, equally to hold when the great fountain or reservoir is approached to seek a relief which there is power of prerogative right to afford. I consider a petition to the lieutenant governor resting on similar grounds, he being the representative of the king, entrusted with the exercise of the prerogative power in his behalf. The more I have reflected on the subject and endeavoured to extract satisfactory rules from the authorities, the more I incline to think that the signing and presenting a petition of this kind to the lieutenant governor ought not to be called in question as a malicious publication, but that, should his decision be in favor of the party complained against, his civil remedy (if any) should be by special action on the case, as for a malicious representation without reasonable or probable cause, sanctioned by the previous decision of the quarter addressed upon the merits, and its assent to the production of the document in evidence. The right of petition would then be protected; and the executive government could always prevent a civil suit, by withholding the complaint, though not substantial, like courts of justice in some cases of indictment by refusing copies. Even under this course the proceeding



would be a civil prosecution for petitioning the king, but it could only be resorted to where individuals are calumniated after a rejection of the complaint, upon the plaintiff giving *prima facie* negative evidence of malice and want of probable cause. It would no longer be inferred from the face of the instrument itself; and probable cause would sustain the defence. In what I have said I of course contemplate a subject matter of complaint like the present, proper in itself, if true, to be represented, and one in which the king can grant relief, though other sources of redress may also be accessible, and to which he may, if so disposed, refer the parties. I find no case or authority that warrants me in upholding an action of the kind before us, under the circumstances in evidence; and if a petition of this sort be actionable as a libel, this strange consequence follows—namely, that although the king could grant instant relief by removal from office, it might be an illegal publication, though probable cause were proved, because prompted by malice, and this although if the same petition were addressed to either house of the legislature it would be fully protected; or, if a criminal prosecution for the subject matter of the complaint was instituted in the king's name upon the prosecution of the petitioner by indictment or information, and the plaintiff was honorably acquitted, no such action could be brought, but, on the contrary, the application to parliament would be susceptible of no civil remedy, at least without a vote of the house taking off the privilege, and not then as for a libel, but a malicious petition; and for the criminal proceedings an action for malicious prosecution could alone be resorted to. In the latter cases, probable cause would alone be a valid defence, yet not in the former, and all this notwithstanding the inability of the legislature or the criminal courts to afford such prompt and effectual relief as the crown could grant. There is manifest repugnance in such a proposition, and if, as argued by Sir James Mansfield in Lord Gordon's case, the Bill of Rights placed petitions to the king, touching public measures or the conduct of public men, on the same footing as those addressed to the houses of parliament, no ground



remains for any such distinction. I think the defendant is entitled to retain his verdict—

First. Because the petition is privileged by the Bill of Rights and the general right of the subject at common law, and no civil remedy lies unless case for a malicious complaint—none as for a libel.

2ndly. Because, if not so protected, it partakes of the nature of a judicial application, and is in a course of seeking justice from a competent power, and consequently not libellous, but to be redressed in another form of action, if malicious and causeless.

3rdly. Because, if not, it is at least a case of ordinary privilege, and the evidence fails to present a sufficiently strong case for a jury to weigh; the *bona fides* of the defendant is not sufficiently impeached: malice is not sufficiently proved to warrant or support a verdict for the plaintiff.

*Per Cur.*—Rule discharged.

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#### POPPLEWELL EX DEM. CAPREOL V. ABBOTT.

A judge at chambers has power to set aside a judgment in ejectment, and the *habere facias* possession thereon issued.

In this case, immediately after last term, an appearance and plea was filed in the name of Isabella Jones, in lieu of the defendant Abbott, and the plaintiff's attorney entered up judgment and sued out an *habere facias possessionem*, contending that the order of the court in last term meant that a common consent rule should be entered into, as in ordinary cases. On application at chambers, Sherwood, J., on hearing all the circumstances on affidavit, set aside this judgment and the *hab. fac.*, on terms which were complied with forthwith by the defendant.

*King* now moved to discharge this order, upon the ground that the judge had no authority to interpose and set aside a judgment at chambers. *Draper* shewed cause and cited 2 Ad. & Ellis, 381.



*Per Cur.*—A judge in chambers may grant relief upon judgments against casual ejectors in ejectment, so as to let the tenant in to defend. It is stated in most books of practice, that a judge in chambers may compel the plaintiff to accept a plea or stay proceedings, if he will not consent to waive a regular judgment against the casual ejector, and the recent case cited shews that the course at present is at once to grant relief, by setting aside the judgment in chambers on such terms as may be deemed just.—2 Ad. & El. 381; 2 Sal. 516; 2 Sell. 101; 7 Mod. 211; Str. 975; 4 Bur. 1996; 5 Taunt. 205; 3 Taunt. 206; Imp. Pe. 279; Tidd, 545; 2 Arch. P. 49.

*Per Cur.*—Rule discharged with costs.

#### DOE EX DEM. DAILY V. VANKOUGHNET.

A., being indebted, made a voluntary conveyance of certain real estate to B., to prevent its being taken in execution, leaving however ample property to satisfy the claims of his creditors. A creditor obtained judgment, after this conveyance, against A., but before any execution against lands B. sold to the defendant for a valuable consideration, but with notice of the nature of the first conveyance. After this sale an execution was taken out, and this lot was sold, apparently to satisfy the judgment. It appeared, however, that the judgment was in fact satisfied by the heirs of A. out of his estate, and that the sale under this execution was intended for their benefit, and the purchaser at sheriff's sale was acting on their account, and had paid nothing: *Held*, that this sale could not defeat the conveyance made by A. to B., and by B. to the defendant.

Ejectment for lands in the Eastern District. At the trial at the Eastern District Assizes, before Sherwood, J., the following facts appeared:—One Barnhart, being indebted to Blackwood & Company, was at the same time the owner of the premises in question, being a house and lot in the town of Cornwall, and also of other property, real and personal, and particularly a farm near Cornwall, worth more than the house and town lot, and of much greater value than the amount of the debt. For some reason, he was desirous of saving the house and lot in town from being sold at the suit of his creditors, preferring rather that, if any of his real estate should be taken in execution, it should be the farm near Cornwall, which was abundantly sufficient to pay the debt. In order to cover the house and town lot, he made a pretended sale of them to one Cozens, and exe-



cuted a deed to him, in which the consideration was stated to be 150*l.*, received in money ; but on the part of the plaintiff it was suggested that nothing in fact was given or intended to be given by Cozens for the land, and that there was an understanding between them that the deed should be given up, when Barnhart had settled with his creditors. No judgment was at this time entered against Barnhart. Instead of being faithful to his trust, Cozens acted as if the property had really been sold to him, and, about two years after he had received the deed, he conveyed the premises to the defendant in this action, for a consideration of 150*l.* There appeared no reason to doubt that this consideration was paid, and so far the sale to defendant was *bona fide* ; but it was proved that he was aware, when he made the purchase, of the manner in which Cozens had acquired the property. Between the time of the making of the deed to Cozens and the sale to defendant the judgment against Barnhart had been entered, and a *fi. fa.* against his lands had issued before the execution of the latter conveyance, though it was not placed in the sheriff's hands until afterwards. Upon this writ the premises in question were sold, the defendant, who was then in possession, being present and forbidding the sale. The lessor of the plaintiff became the purchaser, and he now makes title under the sheriff's deed. At the same time, and immediately after these premises were bid off, the farm lot was also put up and sold in like manner for 280*l.*, a sum much beyond the amount of the execution. But, although this sale took place at the desire of the attorney of Blackwood & Co., it seems not to have been in reality for their benefit, but, on the contrary, a mere contrivance to defeat, if possible, the effect of the voluntary conveyance to Cozens—a contrivance intended for the benefit of the heirs of Barnhart, with whom the lessor of the plaintiff is connected, whom the attorney of Blackwood seemed willing, if possible, to assist. The execution was never in fact satisfied from this sale ; nothing was ever paid, nor, as it seems, expected to be paid, by the purchaser at the sheriff's sale, and not long after the farm was given up to the heirs of Barnhart. The debt had been arranged



by conveyance of other lands to Blackwood & Co. ; this sale was therefore not resorted to for the purposes of making their debt, but as the means of divesting, if possible, the title which the defendant had acquired through Cozens.

The verdict for the defendant was moved against by *Sullivan* for the plaintiff in Michaelmas term last. *Draper* argued for defendant.

ROBINSON, C. J.—In our opinion, the verdict for the defendant was proper, and this rule must be discharged. On the facts, it is evident that the lessor of the plaintiff is not entitled to recover, however little it may seem to comport with justice that the title of the defendant, acquired as it was, should be confirmed. If the conveyance to Cozens had been made to defraud Blackwood & Co., then it would follow that neither they nor any other creditors of Barnhart could be suffered to be prejudiced by it ; and this defendant, a purchaser with notice, would be in no other situation than Cozens himself would be, and would be equally disabled from holding under such a title ; but it does not appear that the design of Barnhart was to defeat his creditors in the recovery of their debt, but merely to leave his other property, and not this, subject to their execution. In fact, they were not defrauded, defeated or delayed—ample property was left for them, out of which their debt would have been satisfied, if the heir had not chosen voluntarily to discharge it, by assigning other lands. It is not, therefore, as against these or any other creditors of Barnhart that we can hold this deed to be void and of none effect under 13 Eliz. ch. 5.

It is not pretended that any fraud was practised upon Barnhart in obtaining the deed. He had it in his power, if he pleased, and circumstanced as he was, to give away this estate, and leave his children to be satisfied out of his other estate. So long as they were satisfied, no wrong was done. As against himself, the deed of Barnhart must be treated as valid, and however hard it is upon the family of Barnhart, and however dishonest in Cozens that he should act in the manner imputed to him, still they are without remedy. They had no interest in this estate, when Barnhart



made so imprudent a disposition of it, and might never have had an interest in it; at all events, it was at the will of Barnhart, so far as they were concerned, to do with it as he liked; and his heirs, or any person claiming under him, is concluded by his acts, except that the law would have interfered to protect creditors if necessary. The land is gone from him and from his heirs, by the deed which he deliberately executed. It was probably imagined that if the family of Barnhart satisfied the creditors by other means, they would then acquire a right to stand in their place, and that they might, with their assent, satisfy the judgment in their name, as the means of reimbursing themselves, and would be clothed with their rights, as creditors, in resisting this voluntary conveyance. But, in the first place, if it could be allowed to a third party to make himself a creditor for such a purpose, it is not shewn that the lessor of the plaintiff satisfied any part of the judgment; but, on the contrary, it is proved that it was the heir of Barnhart who settled the debt; and, in the next place, abundant other property was left for the execution, and was in fact sold under it, so that the claim of the creditor was not and could not be defeated, delayed or hindered by the deed to Cozens, and therefore no reason is afforded for holding the deed void under the statute. This was the view taken by the learned judge at the trial, and we have no doubt it was correct, and that the verdict for the defendant should stand.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—It is very questionable whether the hearsay declaration of Barnhart, preceding or subsequent to the conveyance to Cozens, could be proved to impugn the title of the latter, however acts and expressions, contemporaneous with the execution of the deed, as being part of the *res gestæ*, may be admissible.—1 Esp. 357; 5 Esp. 243. Declarations of Cozens, at any other time than concurrently with the conveyance to defendant, would be also liable to question, unless they were made before such conveyance, adversely to his right, and, as being so made, could be urged against the validity of his title in this action, by reason of the defendant's knowledge or notice of the alleged fraud or



ground of impeachment before he purchased, but no exceptions of this kind were urged at the trial, and, upon the evidence, the validity of the defendant's title may be regarded in a twofold point of view—1st. Under the statute 13 Eliz. ch. 5, as fraudulent against creditors of Barnhart; 2ndly. As a voluntary conveyance from Barnhart to Cozens, and void against a subsequent *bona fide* purchaser for value, under the 27 Eliz. ch. 4.

Touching the subject of notice in defendant, it is to be observed, the 13 Eliz. ch. 5 protects all interests acquired upon good consideration and *bona fide*, and without notice or knowledge of the covin, fraud or collusion complained of; while the 27 Eliz. ch. 4, sec. 4, protects all titles acquired upon and for good consideration and *bona fide*, without mentioning notice or knowledge; and under the latter act it has been held that a purchaser, *bona fide* and for value, &c., is entitled to its protection, although he had previous notice of the voluntary conveyance. In a case within the former, it would seem that, upon proof of knowledge or notice, a purchaser, otherwise *bona fide* and for value, would be exposed to have his title impugned by a creditor, upon the ground of fraud in the antecedent conveyance through which he claimed, and which, being by the statute declared utterly void, frustrate and of none effect, the foundation of his title would fail and be destroyed, in the event of such fraud being established. In this case, therefore, it would seem competent to the plaintiff to shew, as against defendant, that the deed from Barnhart to Cozens was fraudulent, as against Blackwood and Larocque, creditors of Barnhart, under whose judgment and execution he claims title, by virtue of a sheriff's sale and sheriff's deed. As to which it appears that Barnhart was indebted to Blackwood and Larocque at the time the deed to Cozens bears date, and indeed it must have been executed pending the suit; and there is, in my opinion, sufficient legal evidence in the circumstances to go to the jury, to say whether it was not, as against creditors, a fraudulent transfer; but two objections are urged against the materiality of the consideration of that question in this case—1st. That it is proved that



Barnhart was at the time in good circumstances, not insolvent, and that the alienation of the property did not produce insolvency, abundance of property still remaining in him for the satisfaction of this debt to Blackwood and Larocque; and the cases in 5 Ves. Jr. 387, 12 Ves. 148, 3 B. & Ad. 366, seem to establish that, as applied to the facts of this case, it constitutes a sufficient answer to the objection. The conveyance to Cozens did not exhaust Barnhart's estate, nor was it calculated in effect (whatever its object might have been) to defeat or delay the creditors named—a valuable farm still remaining in his possession, amply sufficient to realize a much larger debt. In this view, therefore, the operation of the statute 13 Eliz. ch. 5 is prevented. Another objection is, that it is not a *bona fide* proceeding by a creditor, but in collusion with the heir-at-law of Barnhart, now deceased, or at least at his desire, in order to assist him in undoing his ancestor's act, and not, in truth, as a necessary recourse to enforce an unsatisfied debt—the same having been otherwise paid, and ample estate, independent of the present, being forthcoming to answer it. If the parol evidence received is legally admissible to explain away the sheriff's deed and return to the writ, I am disposed to think it would conclude the plaintiff. In the sheriff's deed the plaintiff is recited to have purchased, and the premises are conveyed as for a consideration of 80*l*. It is in evidence, by parol, that no such sum was paid, and that the heir of Barnhart satisfied the debt otherwise, the plaintiff being in truth a mere agent—a trustee in his behalf—and the land having been sold in order to enable the heirs of Barnhart to call in question, and, if possible, defeat the conveyance of his ancestor to Cozens. To entitle a creditor to the benefit of the statute, it must be a *bona fide* proceeding on his part; and what cannot be done directly cannot be accomplished indirectly. Of course, whether it was a fraudulent conveyance against creditors need not in these views be determined; if material, it would form a proper question for the jury under the evidence. Then, regarded under the 27 Eliz. ch. 4, (in which notice to the defendant is immaterial), the plaintiff's case is equally defective. If material,



it should be decided by a jury whether the conveyance to Cozens was voluntary or not; but, assuming it to have been voluntary, the plaintiff fails on two grounds—1st. That, before he became a purchaser the defendant acquired title from Cozens as a *bona fide* purchaser, and so within the protection of the 4th section of that statute; and, if not, that as between plaintiff and Cozens, without regard to the defendant, the plaintiff is shewn to be himself a nominal actor only, and not a purchaser for value and *bona fide*, without which he is not entitled to the benefit of the statute: that, as the heir of Barnhart could not directly question the conveyance to Cozens, he cannot do so indirectly through the interposition of the plaintiff in his behalf and with a view to his benefit. The cases all shew that parties and juries are generally bound by alienations, fraudulent as against creditors, or voluntary as against subsequent purchases; and however hard it is in this instance, and it has the appearance of hardship, as respects the heirs or devisees of Barnhart, the rule is too inflexible to be unbent or relaxed, so as to restore the estate under existing circumstances, as disclosed in evidence at the trial.

*Per Cur.*—Rule discharged.

#### ROGERS ET AL. V. BARNUM.

A deed poll will operate as a bargain and sale; and the statute 4 Wm. IV. ch. 1, sec. 47, has a retrospective operation, so as to make deeds of bargain and sale, executed before the act, valid without registry.

*Trespass quare clausum fregit.* Plea—Not guilty. To prove their title to the *locus in quo*, lot 26, in the broken front in front of the first concession of the township of Haldimand, the plaintiffs produced letters patent dated 29th October 1803, granting that lot to one Rana Perrin; they next put in and proved a deed of bargain and sale, dated 25th November 1803, from Perrin to D. M. G. Rogers, Esq., now deceased, which deed has not been registered. Rogers died in July 1824, and his will was given in evidence, whereby he devised all his lands to his wife (since dead) for life, then to the two Rogers (plaintiffs) and to their sister,



to whom Cassedy, the other plaintiff, is married, as tenants in common. This will was made in June 1824. In May 1834 the plaintiffs made an entry on the land and asserted their claims as devisees, and desired defendant to quit possession. Defendant asked by what authority they warned him off, and requested them to go with him to his house, and he would shew them his bond; this the plaintiffs declined, seeming to understand what bond he alluded to: defendant reproached plaintiffs for the part they were acting, but said he was glad they had come, as the matter would now be settled; that they thought he had demanded a deed too soon, and they would see whether he had or not. One of the plaintiffs, on the other hand, reproached the defendant with having said to him that he had been speaking to the executors of Rogers respecting this lot, which he had ascertained not to be true; while the defendant insisted that he had spoken to one of the executors respecting it. To prove the trespass, it was shewn that the defendant last spring inclosed and cultivated a small field on the lot, and that he had for many years past got from it any wood that he wanted, and had let his cattle run there. The defendant moved for a non-suit—1st. Because the deed to Rogers was not registered, and so could have no operation as a bargain and sale; 2ndly. Because it was not proved that Rogers had ever entered, and before entry he could not transmit by devise. He relied also upon a title acquired by adverse possession, not calling witnesses on his part to make out this defence, but depending on the facts as stated by the plaintiffs' witnesses. The Chief Justice, who tried the cause, overruled the two objections made as grounds of non-suit, considering that the 47th clause of our statute 7 Wm. IV. ch. 1 rendered it no longer necessary to shew that a bargain and sale has been registered, unless for the purpose of precluding a claim under a deed subsequently registered; and, as to the necessity of Rogers having entered, it did not require an entry after the bargain and sale made to him in 1803, to perfect his estate—he was seized by the deed, no one being shewn to have been then in adverse possession of the land. If indeed Rogers was disseised



after his title accrued, and devised before entry, the devise would be void ; but whether he was disseised or not was a question of fact for the consideration of the jury, and one which it became necessary to consider in deciding upon the case set up by the defendant under the Statute of Limitations. With respect to any possession of the land adverse to Roger's title : In 1803, when Perrin conveyed the land, it was not certainly proved that any one was or had been in actual possession. It was stated by one of the witnesses that he believed one Lothrop was living at the time on the lot, the same person who subscribed the deed from Perrin to Rogers as an attesting witness ; there was no proof that he had ever held adversely to Perrin or to Rogers ; his attesting the deed by which Perrin conveyed to Rogers renders it improbable that he was in adversely to Perrin, and there was nothing to shew that the character of his occupation was changed when Rogers succeeded to the title. Soon after the deed was made Lothrop removed to the United States with his family, and never returned, which certainly does not look as if he was before in as claiming the fee. Some time after his family returned and lived again on the same lot for a time, and then they also finally left it—this was stated to have been somewhere about twenty years ago, but the witnesses could not speak definitely as to time. After they left it one Green, it was proved, lived upon the land for a time, and, after his possession ceased, the defendant Barnum exercised ownership over it, cutting wood, pasturing his cattle, &c., but how long this had been the case was not made to appear—it was somewhere about twenty years—but so far as the evidence could be relied upon, it seemed more probable it was less than twenty years ; and “twenty years ago,” which was the expression of the witness, would be about eighteen years and a half before the devisees made their entry. How defendant's seisin commenced was not shewn. The late Mr. Rogers lived on a farm in the vicinity, but does not appear ever to have gone into possession of this lot. The defendant lived on another lot, which is near the premises in question, but never dwelt on these premises. He was



shewn however to have exercised acts of ownership which Rogers never seemed to have done, but under what circumstances defendant first took possession was not at all shewn. The jury found for the plaintiffs, damages one shilling; and in Michaelmas term last *H. Sherwood* obtained a rule nisi to set aside the verdict, relying on the objections urged at the trial. The *Solicitor General* shewed cause. Judgment was now given.

ROBINSON, C. J.—I see no evidence here of a disseizin that should have disabled Rogers from devising. So far as the evidence went, it tended, I think, to prove that there had been some contract or understanding between him and the late Mr. Rogers, but nothing was produced. His talking of a bond, reminding one of the plaintiffs that he had not asked for a deed too soon, and asserting that he had gone and spoken to one of Roger's executors on the business, all tended to imply a privity between him and Rogers—5 B. & A. 223. The facts on the defendant's side were left wholly unexplained; his counsel were silent to his legal claim, and gave no account of his right of possession. There was no proof whatever that the late Mr. Rogers and defendant had stood in a hostile relation to each other; but, on the contrary, I inferred from the whole complexion of the case that defendant had gone in under some contract with Rogers, or was at least in possession upon some understanding with him, but nothing conclusive on that point was proved. Then, as to the Statute of Limitations, I told the jury they ought to be satisfied there was an uninterrupted adverse possession for the full term of twenty years, before they could hold the right of entry of Rogers barred. They found for the plaintiff.

I see no ground for interfering with their verdict. If defendant can shew an adverse possession of twenty years more clearly than was shewn on the last trial, he may retain possession, and put the plaintiffs to their ejectment. Nothing can be more simple than his title, if he can establish the fact. In this action of trespass he made no attempt to do it, by calling any witnesses of his own, and the facts which he elicited by cross-examining the plaintiffs' witnesses were



not sufficient to make a clear case in his favor. This long possession however is to be respected, and calls upon us strongly to consider whether, in strict right, these plaintiffs can treat him as a trespasser. The plaintiffs not being in actual possession when the alleged trespass was committed, were reduced to prove title. On their side the case was simple. Perrin was the grantee of the crown. Their next step was the proof of Perrin's assignment to Rogers—that was by a deed poll, not called an indenture, and only professing to be the deed of the grantor. It contained however the common operative words of a bargain and sale, and was expressed to be made upon a good pecuniary consideration, but it has not been registered. No livery of seizin was shewn, and as possession has never attended the deed, there is no foundation for presuming livery. This conveyance, therefore, must either take effect as a bargain and sale, or not at all. Its not being by indenture has already been determined by this court not to prevent its operating as a bargain and sale. It is, in fact, a deed of bargain and sale; and, if it be admitted not to be an indenture, although it would follow that it could not pass the seizin of the estate under the Statute of Uses, 27 Hen. VIII. ch. 10, because the Statute of Enrolments, 27 Hen. VIII. ch. 16, required that a bargain and sale shall be “by deed indented and enrolled,” &c., yet it would not therefore follow that it would not be a valid and effectual conveyance under our provincial statute 37 Geo. III. ch. 8. That statute is very comprehensive in its language. It declares, that when any lands have been sold or shall thereafter be sold, under any deed of bargain and sale, and such deed hath been or shall be duly enregistered in the register office of the county in which the lands are situated (agreeably to the statute 35 Geo. III. ch. 5), the same shall be and is thereby declared to be a good and valid conveyance in law. Nothing is here said of the deed being indented, and whatever argument might be raised upon the intent and effect of this provincial statute, passed as it was in reference to the Statute of Enrolments, the sufficiency of a deed poll to operate, when registered as a bargain and sale, has been long ago established by a



decision of this court, and ought not now to be treated as an open question, as many titles since acquired may depend upon it. Then, as to the want of registration: Undoubtedly that would have prevented this deed from passing the estate if it were not for our provincial statute 4 Wm. IV. ch. 1, sec. 47. But it has been argued that the statute is not in this respect retrospective—that in its language it is not so, and that the legislature cannot be supposed to have intended it to be retrospective, because then estates already vested would be divested by the operation of this act. The words of the statute are—“That after the passing of this act a deed of bargain and sale of land in this province shall not be held to require enrolment or to require registration to supply the place of enrolment, for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold.” It is not provided that deeds of bargain and sale, executed after the passing of the act, shall not require enrolment, but that after the passing of the act that requisite shall be dispensed with in making proof of title—the law shall be otherwise, and such deeds shall not be *held* to require enrolment, not that after the passing of the act they shall not require *to be enrolled*. That the statute was intended to be retrospective is further to be collected, I think, from the nature of many of the other provisions contained in it—as, for instance, the 14th, 22nd, 46th, 50th and 51st sections, on examining which it will be found that in some cases the remedy is clearly intended to be afforded retrospectively, while in others, where it was thought inexpedient or unjust to do so, the act is carefully so framed as to allow it to operate only prospectively, and the last clause of the statute leads very strongly to the conclusion I have expressed, for its object is to limit this retrospective operation in certain cases; and, with respect to arguments founded on the supposed improbability of such an intention, our early provincial statute 37 Geo. III. ch. 8, on the same subject, was clearly retrospective, and many other instances of similar enactments being retrospective can be found in our own statutes and in the laws of England. And besides, as was



observed during the argument, by giving to the statute in this respect a retrospective operation, nothing more is done than would have been effected by a registration of the deed, which may be made at any time, and which, when made, would have relation back, and make the conveyance valid from the time of its execution.

Seeing, then, that there is no ground on which it can be denied that Mr. Rogers was seized of an estate in fee in possession, he could of course devise such estate. A bargainor is capable of devising without having actually entered—Cro. Car. 304. The will was legally made and duly proved. No entry by the devisees was necessary to entitle them to bring trespass, but in fact they did enter; and their entry, if any doubt could arise upon the right of a bargainor to maintain trespass before an actual entry, (upon which there are conflicting authorities), has removed that doubt. But in this deduction of the plaintiffs' title I have supposed no difficulty to be created by the ouster or disseizin of Rogers, or the adverse possession of any other person or persons proved at the trial.

I did not at the trial expressly leave it to the jury to say whether Rogers had been disseized before his death, for it appeared to me that as the law is now held upon the point of disseizin, the evidence did not present a case that called for their consideration with that view. I thought the case turned upon the Statute of Limitations, and must be governed by the fact of twenty years' adverse possession. That is still my opinion; and for the reasons I have already stated—the unconnected possession at intervals of Lothrop's family, Green and the defendant, the want of evidence, shewing clearly that it covered a period of twenty years, and the evidence of what has occurred between these plaintiffs and the defendant—inclined me strongly against the title set up under the Statute of Limitations.

There are certainly some peculiar circumstances attending the title derived through Rogers. It is strange that he should have neglected to register the deed—that he should have omitted for so many years to exercise any act of ownership over the land, and should have acquiesced so



long in the possession held by this defendant. Nevertheless, it is necessary to consider whether these circumstances, or any others, invalidate the title of the plaintiffs; and if they do not, then their title, being ascertained to be legal, must be respected in the same manner as other legal titles, and must not be suffered to be defeated by an adverse possession, which is not brought clearly within the protection of the statute. There can be no middle course adopted in deference to any considerations that have not a decided legal effect. The most important interests of the community require that we should adhere to well settled and established principles, in contests about real property. The action is not brought for damages—the verdict gives only a nominal sum for the trespass. It was the right that was litigated. One's leaning is in favor of a person who has been in notorious and peaceable possession, and it does not appear reasonable that he should be suddenly treated as a trespasser after an occupation of many years, apparently not objected to or complained of. On the other hand, it is to be considered that the defendant must be conscious of his own right, whatever it may be. He has been silent respecting it, and that silence leaves room for inferences either way. For all that appears to us, the length of possession may, if the facts were laid open, shew only a great forbearance in the plaintiffs or in Rogers, which it would have been imprudent in them to have continued longer. Believing the plaintiff's title to be sufficiently made out, I certainly did not think the twenty years' possession was so proved as to warrant the jury in relying upon it, and I charged them strongly to that effect. There being no proof whatever of privity between defendant and either of the persons who had successively occupied and left the place, before he entered, I considered the question confined to an adverse possession of twenty years by him. If my brothers think I might have been justified in looking more favorably upon the evidence in respect to this possession, I will willingly concur in a new trial, that the facts may be again investigated and considered, for the case involves the title to a valuable property, which may as well be decided in this



action as any other, though of course not conclusively, any more than in an ejectment.

SHERWOOD, J., (after stating the case).—It was nearly ten years after the death of Mr. Rogers, and more than twenty years after the deed was executed, before the statute 4 Wm. IV. ch. 1 was enacted, and I incline to think it cannot have the effect to make the deed a valid conveyance, so as to pass the estate, for the following reasons.—1st. It would, in that particular, be an *ex post facto* law, and would be entirely different in its nature from the other parts of the act. 2ndly. Such a construction as the plaintiffs advance would be contrary to the spirit and intent of the Registry Act and of the Statute of Limitations, 21 Jac. I. ch. 16. The deed was undoubtedly invalid for want of registry before the act was passed, and therefore must be retrospective to reach such a conveyance; and, although the legislature had the power to make such a law, still, if it does not clearly appear by the words of the statute that they designed to do so, the court will not intend they did. When we consider the number of estates vested either in possession or interest which must necessarily have been created within the course of twenty years, as well by the act of the parties themselves as by operation of law, we cannot but admit that many might be unjustly defeated by the construction contended for by the plaintiff. The legislature have carefully guarded against a retrospective effect in almost every section of the act, introductory of any new principle, by words so explicit that they cannot be misunderstood, which also affords an argument for intending that this enactment was intended to be prospective in its operation as well as the others. It is said in Co. Lit. 383, b., that a statute is most naturally expounded by the other parts of itself; and my impression is, that no part of the act in question is retrospective.

With respect to the second point: Such a construction as the plaintiffs advance would be contrary to the spirit and intent of the Registry Act and of the Statute of Limitations. By the Statute of Enrolments, 27 Hen. VIII. ch. 16, a deed of bargain and sale of lands in England will not pass the



estate absolutely unless the deed be registered within six months after its delivery ; but it was determined in this province before the statute 4 Wm. IV. ch. 1, that the estate passed if the deed were registered after six months, because our Register Act does not require that the deed should be registered within any specific period from the making of it. How long a bargainor however might delay the registration of his deed, when it is necessary for its validity to register it, still remains a question to be decided. Suppose a person owns a lot of land in fee by a registered title, and sells it to A. by a deed of bargain and sale, and then to B. in the same way for a valuable consideration, and neither deed is registered for twenty years, no one having possession of the land, and then B. registers his deed, would he or A. have the legal estate ? The Statute of Limitations enacts, "That no person shall make any entry but within twenty years next after his right or title shall first descend or accrue." A., the first purchaser in the case just put, would have a legal estate since the passing of 4 Wm. IV. ch. 1, without registry, subject to be defeated by the registry of B.'s deed. By the Register Act B. has the election of registering his deed or not, and is perfectly aware that he can have no right of entry till his deed is registered. Now I see no reason why B. should be in a better situation than any person who has a good right or title, but neglects to make entry for twenty years. The general policy of the law is, that using due diligence is always to be favored, but negligence is to be discouraged, according to the legal maxim—" *Vigilantibus non dormientibus servit lex.*" The law regards those only who watch and not those who sleep. The law is only for the protection of those who take due care of their property. It notices not those who suffer from their own neglect. To hold that B., the second purchaser, would have a longer period than twenty years to register his deed, would wholly prevent the beneficial effects of the Statute of Limitations in a great number of cases, which certainly appear to me to be analogous in principle to other cases which the statute clearly embraces. I think the title of a *bona fide* purchaser, or of his heir, devisee or assignee, has



a stronger claim to protection than the mere possession of a wrong doer, and therefore incline to the opinion, that the legislature, in passing the Registry Act, never intended that his title should be defeated by a subsequent purchaser, after the lapse of the same number of years which protects even the possession of one who usurps the legal right of another. This is my present impression of the general principle of the law on this subject.

According to my present impression, the late Mr. Rogers had entirely lost his right of registering his deed before his death, and therefore his will cannot be valid, and that the 4 Wm. IV. ch. 1 cannot legally be construed to reach such a case, if it were even held to be retrospective as regards cases where twenty years have not elapsed before the passing of the act, and where the bargainees possessed the right of registering their deed when that act was made. I also think the whole scope and spirit of 4 Wm. IV. ch. 1, go to restrict the right of registering deeds of bargain and sale to twenty years, by analogy to that part of the act which allows the same time for making claims to real estate, and which wholly extinguishes all right to do so after that period. I cannot agree with my brothers in opinion that the plaintiffs ought to recover in this action, whether the statute 4 Wm. IV. ch. 1 be retrospective in its operation or only prospective, because I think the laches of the late Mr. Rogers, in not registering his deed within twenty years from its execution, had the same effect as neglecting to enrol a like deed within six months in England, and that the legislature could not intend, under any circumstances, to give validity to such a deed.

MACAULAY, J.—It appears to me that the 47th section of the provincial statute 4 Wm. IV. ch. 1 is retrospective, and dispenses with the necessity of enrolment in all subsisting deeds of bargain and sale that would have been previously valid when registered. The present is a deed of bargain and sale, but not an indenture, and consequently could not operate to transfer the estate under the provisions of the statute 27 Hen. VIII. ch. 16, being a deed poll. The provincial statute, however, seems to have dispensed with the



necessity of a deed of bargain and sale being indented ; at least, it is susceptible of that enlarged construction. It enacted, that when land was sold under deed of bargain and sale, and such deed was duly registered, the same should constitute a good and valid conveyance in law. The late act seems merely to dispense with the necessity of registration or enrolment, providing, that after the passing of that act a deed of bargain and sale of land should not be held to require enrolment for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold ; and, as applied to the Statute of Enrolments, 27 Hen. VIII., it would not in terms give validity to any conveyance of bargain and sale that was not by deed and indented ; but, construed in conjunction with our act of 1797, ch. 8, it would seem the true meaning and effect of both, that any deed of bargain and sale which, being registered, would then be good and valid in law, should, for the future, operate without being registered ; and, as that statute may comprehend other deeds besides indentures, the statute of 27 Hen. VIII. may now be considered inapplicable, as respects both indenting and enrolling. I therefore conceive the present conveyance valid and operative in law, at and from the the time of its execution in 1803.

Like a mortgagor after default in payment, according to the condition, a tenant at sufferance, holding over, may be deemed in adverse possession or not under the Statute of Limitations, according to circumstances ; and, if adverse, it should be so found by the jury, as depending upon intention.—1 D. & R. 272 ; 2 B. & P. 542 ; 11 Ea. 49 ; 3 B. & C. 413 ; 8 B. & C. 717 ; 2 Bing. 10. If Lothrop's holding was not adverse to Rogers, then the latter was in full possession through him, and the subsequent occupation by Lothrop's family might be regarded as a mere continuance of his engagement, in the same relation in which he stood towards Rogers from the beginning ; if not, it should be so found. Then Green's subsequent possession may be referred to a rightful entry, either as succeeding Lothrop's family by assignment or license, or by the immediate permission of



Rogers ; and, if otherwise, it should be found that he held adversely. It should also be found whether the defendant entered under him, or whether he came into possession under Rogers. The facts may present a case in two distinct lights, according to the nature of the occupation from 1803, as respects Roger's title. If the occupants held as disseizors or adversely, and in succession and privity, or even if each in turn held adversely in immediate succession, though upon independent entries, the statute in the former case certainly would, and in the latter might, conclude the plaintiffs. On the other hand, if they held in privity, with or under Rogers—the relation of landlord and tenant subsisting continually, or, if any did so, so that the late possessors have not held adversely (if at all) for twenty years—in such events, the statute would not apply, and the plaintiffs' entry would be lawful, unless indeed it were shewn that those possessing under Rogers held not as mere tenants, but as purchasers, having paid the price, in which case, after so great a lapse of undisturbed enjoyment, a jury would be advised to presume a conveyance. There is no proof of the defendant or his predecessors in possession being purchasers from Rogers and entitled to a conveyance, and no sufficient ground is in another respect laid for presuming one, consequently it turns entirely upon adverse possession, as contrasted with a permissive occupation, with a recognition of his (Roger's) paramount title. If an actual disseizin were proved, it would of course obviate all question touching adverse possession.

At the trial of this cause, little stress appears to have been laid upon the possessions of Lothrop, his family and Green ; and attention seems principally to have been confined to the defendant, as to whom it was left to the jury to say whether he had been twenty years in continued adverse possession before the entry of the plaintiffs, and they have found that an adverse possession of twenty years was not proved, and they may have thought that defendant entered and held under Rogers, of which there was some slight evidence. Looking at the case in this restricted point of view, I cannot say the jury were misdirected in point of



law; and the court cannot control the discretion of a judge at *Nisi Prius* in expressing the tendency of his own mind, as to the soundest conclusions to be drawn from the evidence, so long as he does not withdraw it from the jury, but submits it to them, assisted by strong intimations of his opinion, although one learned judge may be more pointed in his observations than another. Much must depend upon the impressions created at the trial. The only regular inquiry here is—whether the judge erred in point of law, and, if he did, whether the subject matter claims a rehearing. In the way he left it to the jury, I cannot say the Chief Justice erred in law on this occasion, so far as he went; and consequently, however I might myself have left it to them more freely, as respected my own sentiments, I should not be justified in granting a new trial, when the verdict is but for a shilling. The jury were not bound to adopt the suggestion of the court touching conclusions from facts, unless they approved of them, which, in this case, they must be presumed to have done. The difficulty I have felt in the case is, to say whether the Chief Justice should not have gone further back and left it to the jury to pronounce upon the possession from the date of Roger's title; because, if the verdict is to be understood merely to affirm the facts in evidence, without including any expression of opinion as to the nature of the possession held by those occupying before the defendant—that is, whether permissively under or adversely to Rogers, or whether in privity one with another or independently—and simply to decide that the defendant himself had not held an adverse possession for twenty years, without finding whether he took from Green or Lothrop, or entered immediately after the last occupier, and, if so, whether in continuance of an adverse or permissive possession—in short, without expressing any opinion upon the nature, footing, duration or order of the prior possessors. I say, if the verdict is restricted to a mere expression of opinion upon the defendant's own possession and the affirmation of the facts in evidence in relation to the others, without determining anything respecting their holding, as between themselves respectively or between them



and Rogers, then there is authority to warrant the court in holding that an adverse possession of twenty years is not found.—1 *Ld. Ray.* 289, 750; 5 *B. & A.* 487; 1 *D. & R.* 340. If material, the jury should find not only facts, but conclusions from facts; and, as no conclusion prejudicial to the apparent title of Rogers seems to have been found, the court would now uphold it, unless the learned Chief Justice at *Nisi Prius* ought, but did not, desire them to take into consideration the nature and effect of the possession that had been held antecedently to the defendant coming in. It seems to have been left to them to say whether the defendant had proved an uninterrupted possession for twenty years, or had held under or in recognition of Roger's right, and on one ground or the other they have found against him. I should perhaps have been as well satisfied with a verdict the other way, but cannot say the present one is wrong, in the absence of any proof of right on the defendant's part beyond an unexplained possession.

I am by no means disposed to refuse full effect to the Statutes of Limitations. They are called statutes of repose, and are meant to quiet possession after twenty years. I am not for doing them away or counteracting them; but they must be applied in practise by the aid of adjudged cases. I have hesitated a good deal on the present occasion, and do not refuse this rule upon an approbation of the verdict, on the broad ground that the case is clearly not within the statute, but on the footing that, upon the evidence, it is questionable, and that the damages are only nominal, the possession not to be disturbed, and the right not concluded.

The second ground is, that the devisor did not die seized, and so could not transmit the estate by his will. If he was disseized, so that his interest was reduced to a mere right, he could not devise; but to support such a defence, a disseizin, strictly so called, should be proved, as distinguished from a mere adverse possession; for if the possession be merely adverse, the owner might devise, as being nevertheless seized of the estate, though ousted of the possession.—7 *Ea.* 299; 8 *Ea.* 552; 1 *Taunt.* 578; 2 *D. &*



R. 538. To constitute a disseizin there must be an ouster of the freehold, reducing the interest of the disseizee to a mere right of entry. Every adverse entry, and, much less, every adverse holding, is not a disseizin, though it may be adverse possession within the Statute of Limitations, under which it would, at the end of twenty years, but not sooner, not only amount to a disseizin but toll the entry, as upon a descent cast. Where protection is claimed by reason of an alleged disseizin, the jury should decide upon the evidence, if there be evidence to go to them for consideration; and so of an adverse possession. The nature of an occupation may be equivocal; and, when so, the jury must determine whether it was adverse or not.—11 Ea. 488; 3 M. & S. 271; 7 D. & R. 190; 4 B. & C. 706; 3 B. & C. 757; 5 D. & R. 650; 7 Bing. 346; 2 B. & P. 542; 8 Ea. 353.

It is difficult to extract any satisfactory general rules upon these subjects from adjudged cases, so much depending upon peculiar circumstances in each. It appears to me there is a substantial difference between a disseizin and a mere adverse possession.—Bur. 126. None can be disseized but a freeholder, yet a tenant for years may be kept out under an adverse possession. Every disseizin includes adverse possession, but not *vice versa*. The one relates to and operates upon the estate—the other on the possession. To constitute a disseizin, the original entry must (generally) be tortious, and the object, intent and effect of such entry must be to oust the owner of the freehold.—3 M. & S. 271; 5 B. & A. 689. Adverse possession may arise out of a wrongful entry, or a wrongful holding over or withholding of a possession rightfully acquired. The one is a prejudice to or ouster of the estate or freehold interest, the other of the possession of the property. One may be ousted of the possession without being ousted of the estate—the possession may be lost, but the seizin remains. The one is superficial, the other goes much deeper. This broad line is readily understood. The difficulty is to determine—1st. What is a disseizin or a mere adverse possession, when it is confessedly one or the other. 2ndly. Whether a possession,



confessedly not a disseizin, is nevertheless adverse or not within the statute. The statute 21 Jac. I. ch. 16 enacts that no one shall make any entry into any lands, &c. but within twenty years next after his right or title which shall first descend or accrue for the same. It is said that right or title, as used, mean a right or title to make entry; and of this right of entry it is known that in many instances it was requisite to give complete seizin, as in cases of descent and others, in which, until actual entry, the inchoate seizin in law only subsisted, requiring entry to give absolute seizin in fact. The right of entry would, in such case, first accrue with the seizin in law. In other cases, it might depend upon the expiration of some prior estate or life, or commencement of a term or title, and the like.—Com. 217, 220; Bull. N. P. 102, b.; 2 B. & P. 542; 3 B. & C. 413; 5 D. & R. 273; 1 Esp. 461; 1 Taunt. 208; 1 V. & B. 268; 1 Ves. Sen. 189; 10 B. & C. 846. A person once absolutely seized may also be reduced to a right of entry by reason of a tortious ouster, as upon a disseizin; then the right of entry first accrues upon the disseizin. So upon a mere adverse possession, the right to enter accrues from the moment of adverse dispossession; but, without a disseizin, the intention is not reduced to a mere right of entry. Upon an adverse possession only the owner has an immediate right to enter, but he has more—he is still seized though dispossessed—he is not deprived of his freehold. Now, as observed, the right of entry in a disseizee accrues from the time of the ouster, as it does (though in a different sense) upon the commencement of an adverse possession. In the former, a descent cast, after five years, would have tolled the entry; in the latter, it would not; and in the latter, though the Statute of Limitations would begin to run at the time the right to enter accrued, it would be no actual disseizin or estoppel till the twenty years had expired—the owner would remain seized. These distinctions suggest the necessity of carefully considering what “right or title of entry” means within the statute. In many instances, where the party is required to make entry to perfect seizin, or to make it to regain seizin, it is clear enough. When



applied to a mere adverse possession, in which no such necessity exists, it is otherwise; and it would seem to be considered that, in such event, the owner never having been reduced to a mere right cannot be prevented entering or recovering in ejectment, unless an uninterrupted adverse possession be shewn to have continued for twenty years. A difficulty may arise when the possession has not been uninterrupted, though exceeding twenty years—as when a hiatus has intervened, and the possession has remained for a time vacant; or when, though the adverse possession has been uninterrupted, the adverse holder did not so hold in privity, but barely in succession. Of a possession by an adverse holding, short of twenty years and within that time abandoned or relinquished by him, it might be said he was a mere nude trespasser, or that his going away afforded conclusive proof that he did not hold adversely, or that he had eventually recognized the lawful owner's right and restored possession, or left it for the person legally entitled, or that, upon his departure, the subsisting seizin of the owner would, as against all strangers, draw to him the possession, or that he would be in again immediately upon the cessation of the tort which had ousted and kept him out for a time—so that, as against any subsequent adverse party not coming in under the former, a right of action would instantly accrue against him *de novo*, as for a trespass *quare clausum fregit*—a trespass to the possession; in other words, that as between the owner and such tortfeasor the statute would only begin to run, or the right of entry of the person would only first accrue, at the time of such subsequent adverse entry or possession—in other words, that one wrong doer could not add to his wrongful holding that of others who had preceded him, so as to make up together twenty years adverse possession against the true owner, when there was no privity between such wrongful holders. Upon these suggestions I give no present opinion. Then, as to a mere possession, it is often a question of nicety whether it is adverse or not. The books contain many instances in which a possession is not adverse, others in which it was so held; and they shew that it frequently



forms, to a certain extent, a question for a jury whether it was under such circumstances as created a disseizin or not, depending at times much upon intention. The design and effect of overt acts on such occasions require to be determined by a jury. And some cases shew that unless it be expressly found by a jury that a possession was adverse or a disseizin, the court will not intend it, rather, as a matter of presumption, referring the possession to a rightful occupation under the legal owner, than to a wrongful one adversely to him.—6 M. & S. 114; 10 Ea. 583; 9 D. & R. 687; 1 D. & R. 340.

The difficulty I have experienced in the present case arises from the want of satisfactory proof of right on either side. No subsisting title within twenty years is shewn in Rogers, unless by aid of presumptions. His title accrued in 1803 as did his right of entry, if Lothrop held adversely, for he was in possession at the time; but if, from his having witnessed the deed (which is very equivocal proof of an acquaintance with its contents) and the probability of his holding under Perrin, as evinced by his subsequent conduct, he could be regarded as a tenant at sufferance to Rogers, holding over after the determination of a former tenancy at will under Perrin, (which ceased upon the execution of the conveyance to Rogers), still it is all presumption.—1 P. W. 393. There is no evidence that in point of fact Lothrop held under Perrin or under Rogers, or that the relation of landlord and tenant ever subsisted between them, or that Rogers ever was in actual possession or in receipt of the rents and profits, or that those succeeding Lothrop held in privity, with the exception of some slight testimony applicable to the defendant. Adopting the most favorable presumptions, it may be found that the occupants did not hold adversely, or, if any did, that all did not; or, if all did, that they entered independently and not in privity—so that no uninterrupted adverse possession operated against his right. Lastly, he does not mention this property in his will; and, for all that appears, the deed that lay dormant during his life and reposed in his chest between twenty and thirty years may have been given as a temporary pledge, or upon some



inchoate arrangement, or upon some contract afterwards rescinded; at all events, he is not shewn ever to have asserted or enjoyed a right under it. Then, on the other hand, it may be as fair to presume that Lothrop or his successors held by permission of Rogers as adversely, for they shew no right or claim of their own or under any stranger to Rogers asserting adverse pretensions. They shew no purchase, and it is not proved that they held in privity. They may, for all that appears, have merely occupied as a series of squatters, or mere trespassers. To dispose satisfactorily of the case, the court should be informed—1st. Whether Lothrop held under or adversely to Perrin. 2ndly. If under him, on what terms? 3rdly. Whether he held under or adversely to Rogers. 4thly. How those succeeding him held; and, if adversely, whether each independently in immediate succession or with intervening periods, during which the possession remained vacant, or in succession and in privity. 5thly. Whether any entered as disseizors, intending to disseize; and, 6thly. More especially, when and how the defendant became possessed, whether under Rogers or adversely; and, if so, whether in continuation of a prior adverse possession or independently, and whether as a mere trespasser, or an adverse occupant or a disseizor. And, after all, it seems to me it would in this suit be merely a contest about a shilling; for, assuming that the entry proved by the plaintiffs in May 1834 entitles them to this action of trespass, the provisions of the provincial statute of 1834, ch. 1, touching entry, &c., which did not apply to any entry previous to 1st July of that year, will govern upon any future occasion.—7 T. R. 431; 7 B. & C. 399; 1 M. & R. 299. This action would not transfer the possession or suspend the Statute of Limitations, not having been commenced within a year after the entry in May 1834, and in a future ejectment, the first accruing of Roger's right operating must be determined by the provincial statute mentioned; and, as respects the time of limitation, it will run in the defendant's favor *ab initio*, and not merely from the plaintiffs' entry in May, which entry, even before that act, would be ineffectual as against the Statute of Limitations, unless



followed by a suit within a year. On any future occasion the parties must stand upon their former rights, as influenced only by the late statute touching entry, &c., without regard to the result of this cause or to the entry on which it is founded. If I am correct in this view, then it would not be proper to grant a new trial, which is always matter of discretion when no point of law is reserved and where so much rests in presumption, it being as fair (in support of a verdict of one shilling) to presume in favor of what was once a good title, as of a possession founded upon no apparent right, and not ascertained to have continued for twenty years.—See 2 Adol. & Ellis, 17 and 524. If the right were barred or future proceedings were liable to be influenced by the judgment, I should prefer another trial; but as I see nothing to be conclusively decided in another trial, beyond the question whether the defendant shall pay one shilling or nothing, and as the verdict, under the evidence, may be right, I am unwilling to prolong litigation that can have no substantial object.

*Per Cur.*—Rule discharged.

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#### GAMBLE AND BIRCHALL V. JARVIS, ESQ., SHERIFF.

The statute 2 Wm. IV. ch. 5 gave a priority to the creditor suing out the first attachment under which the sheriff seized the goods of an absconding debtor, to have his debt satisfied out of the goods so seized in preference to other creditors also suing out attachments, and who might obtain judgment and execution before such first attaching creditor, where there was no laches or culpable or fraudulent delay in the proceeding to judgment on the part of such first attaching creditor.

The plaintiffs, on the 17th October 1833, sued out an attachment against one Bussell, an absconding debtor, for a debt of 190*l.*, and on the 19th October delivered it to the sheriff, who seized a leasehold estate in Toronto of sufficient value to cover the debt. On the 17th October two other attachments were sued out by other creditors, which were delivered to the sheriff before he made any seizure of the property. These three writs, it appears, were all delivered to the sheriff at the same time, and he returned the property as being attached under their authority. The debts in those attachments amounted together to about 250*l.*



About six days after the plaintiffs' attachment was sued out one McKenzie took out an attachment against the estate of Bussell, and placed it in the sheriff's hands, to which writ it is not shewn that the sheriff made any return. McKenzie obtained judgment and execution before any of the other creditors, and in June or July 1834 the leasehold property, which had been seized on the three prior attachments, was sold under a *fi. fa.* at his suit for 350*l.*, which was more than sufficient to satisfy the debts of the three first attaching creditors, if they were entitled to priority. The plaintiffs did not obtain judgment against Bussell until Michaelmas 1834. One of them attended at the sheriff's sale upon the *fi. fa.* which McKenzie had sued out, and bid upon the property, but did not purchase it. The plaintiffs sued out a *fi. fa.* on the judgment against goods, which the sheriff (the defendant) returned *nulla bona*. For this the plaintiffs brought an action for a false return. The jury at the trial found for the defendant, and in Michaelmas term last *Gamble* obtained a rule nisi to set aside this verdict and grant a new trial.

*Draper* shewed cause. Judgment was delayed till this term.

ROBINSON, C. J.—The questions in this case are—1st. Whether the first attaching creditor gains a priority, so that he can claim to have the goods reserved to satisfy his debt. 2ndly. Whether such right, if it existed, was lost in this case by the delay in the plaintiffs' proceedings. 3rdly. Whether the plaintiffs, by bidding at the sale, waived their claim to priority, and must be taken to have acquiesced in the sale under McKenzie's *fi. fa.* At the trial I directed the jury to find for the defendant if they were satisfied from the evidence that the plaintiffs assented to the sale. I desired to reserve the point of right to priority, but the defendant declined assenting to a case.

It was proved that the plaintiffs had afterwards sued out an attachment to the sheriff of Niagara, against Bussell's estate there, but I do not think that material, for it cannot be considered as a waiver of the advantage of any other attachment, unless indeed it were shewn that satisfaction



had been obtained under it, or in consequence of it. The general principle is, that goods which are in *custodia legis* are not the subject of execution.—1 Show. 177; Holt's R. 643; Cro. Eliz. 691. It is certain that the chattel in question was in *custodia legis*, for it was seized into the hands of the sheriff, an officer of this court, by virtue of a writ from this court. It remains therefore to be considered whether the purpose for which goods are in custody of the law, under our absconding debtors' acts, or anything in the provisions of those acts, prevents the principle from applying to this case.

Though this mode of proceeding by attachment has been for some years in use, this question has not arisen, and there is no decision of this court, and (I think I may add) nothing expressive in either of the two statutes referred to, upon which we can found our judgment. In the act of 1835, ch. 5, there is a provision (sec. 4), which moreover is declaratory, enabling any plaintiff who may have served his debtor personally with process before any attachment sued out against him to obtain satisfaction from his goods, notwithstanding such goods may be afterwards attached, provided he obtains execution before any attaching creditor. This provision no further affects this question than as it shews that the legality of taking in execution goods which had been previously attached was thought doubtful. The creditor who, using perhaps greater vigilance, had served his debtor with process before he absconded, and who therefore did not require the aid of the Absconding Debtors' Act to enable him to obtain judgment and execution, might, without express provision to the contrary (it was apprehended), be deprived of the fruit of his judgment, by another creditor stepping in afterwards with an attachment and seizing the property. This did not appear reasonable, and the latter statute accordingly provides, that in case any creditor, at whose suit a debtor, afterwards absconding, has been served with process, before any attachment sued out against him, shall obtain execution before any person at whose suit the estate shall have been in the mean time attached; he shall be allowed the full advantage of his legal



priority of execution, "in the same manner as if the estate had not been attached, and were remaining in the possession of the debtor." Since this statute, no question therefore can now arise between a plaintiff who has served the defendant with process before attachment issued and any attaching creditor. The precise question before us—namely, upon the right of priority among attaching creditors—is also settled, as to future cases, by the 6th clause of the same act, which provides that when several attachments "shall be placed in the sheriff's hands against the same absconding or concealed debtor, the proceeds of the estate, which shall not have been attached, shall not be paid over to such attaching creditor or creditors according to priority, but they shall be ratably distributed among such of the creditors suing out the said attachment as shall obtain judgments against the debtor; and no distribution shall take place until reasonable time, in the opinion of the court, has been allowed for the several creditors to proceed to judgment."

The present case does not come within this clause; but the language here used and the nature of the provision are material, as shewing the understanding of the legislature in regard to the effect of the former act; and, so far as it may serve to expound that intention, we ought, I think, to be governed by it, for these two acts, being on the same subject, are to be construed together. The words "according to priority," used in this clause, might, I at first thought, be taken to mean "according to priority of execution," but, on consideration, this is not the most natural construction. The meaning seems rather to be, according to priority of the attachments; and, taken in that sense, this clause is a recognition by the legislature of such right of priority, and applies directly to the point before us.

Independently of the general principle of the common law, I am now of opinion that this apparent recognition by the legislature, of the right of priority among attaching creditors, is consistent with the provisions of the first statute. By the first clause of that statute the sheriff receiving an attachment is "to attach, seize, take and safely keep all the estate of the absconding debtor." From the moment he



so seizes them they are in the custody of the law—the sheriff acquires a special or qualified property in them, and the former owner no longer retains the power of disposing of them. The second clause proceeds to explain for what purpose the sheriff is to proceed and attach the goods, for it directs that he shall give public notice that he has seized the property, and unless such absconding person returns within the jurisdiction of the court from whence such warrants issued, and puts in bail to the action, or causes the claim of the plaintiff to be discharged within three months, “all his estate, real or personal, or so much thereof as may be necessary, will be held liable for the payment, benefit and satisfaction of the claim or claims of such plaintiff or plaintiffs.” The 12th and 17th clauses are also material to this question. I was for some time disposed to think that the goods may be looked upon as taken into the sheriff’s custody merely for safe keeping and for the benefit of all the creditors, and as remaining in his hands subject to the first execution which might come against them; but the second clause of the first statute seems to give to the attaching creditor in effect, though not in express terms, a lien upon the property attached, which lien must continue, unless he can be shewn to have forfeited or abandoned it.

With respect to the common law principle, that goods in *custodia legis* are not subject to execution, the cases to be met with in illustration of this principle relate chiefly to goods which have been taken in execution in another suit, from which time they are said to be in the custody of the law, so that no person coming afterwards with an execution from another creditor can seize them. Indeed, it would be unreasonable to hold otherwise; for when one plaintiff has taken the proper legal steps for obtaining satisfaction from the goods of his debtor, there would be neither justice nor reason in allowing another plaintiff, coming after him, to step in before him, in pursuit of the very remedy of which he would be depriving the other. Accordingly this cannot be done, except when the king, by reason of his prerogative, has a preference; or in a case between subject and subject, when the first creditor can be held to have forfeited his



claim to priority by his tardy proceeding. Distress for rent falls of course within the same principle as execution, because the goods are there seized in order to their being sold for the satisfaction of the creditor; and so also (I take it) goods distrained, damage feasant, though they are taken for a different purpose, are in *custodia legis*, and cannot be taken on a *fi. fa.* And the same must be said, I think, of goods distrained to compel appearance. The proceeding by foreign attachment from the Mayor's Court in London affords the nearest analogy to that now in question, and perhaps, indeed, it cannot be distinguished from it in substance and principle.—Co. Lit. 47, a.; Cro. Car. 150. Goods thus attached are held not to be subject to be taken in execution in another suit. The owner of the goods has lost, for the time, his power of disposing of them, and his creditor can have no greater right of disposing of them than himself. The main object of the attachment perhaps, under our statutes, is to preserve the goods from waste and fraudulent removal; but the seizure of the goods serves also, in a distress, to compel the debtor's appearance, for upon his coming within three months, and giving bail to the action, his goods are to be restored. It seems, therefore, impossible to exclude this case from the operation of the principle, that goods taken as a distress are exempt from execution.

If this question respecting the effect of priority of attachment were not prevented from occurring in future, by the provision made in the last act, much hardship might arise in some cases, from holding all the attaching creditors delayed necessarily in their remedy until the first one among them had obtained satisfaction, and an apprehension of such difficulty had inclined me too strongly to an opposite view of this question.

In respect to the particular grounds on which the plaintiffs' claim to priority has been resisted—namely, the tardiness of their proceeding, and their alleged acquiescence in the sale made upon McKenzie's *fi. fa.*: The plaintiffs' attachment was sued out in October. Considering the delay of three months, which the statute requires, I cannot think it safe to infer laches, because the case was not taken to trial



at the following assizes. The cases in which priority is lost by laches are generally cases in which the plaintiff has willingly incurred delay, by giving directions to forbear acting upon his execution. Nothing of the kind was shewn here, and no suggestion of anything like a fraudulent design to cover the property for any concealed purpose. I have no doubt that the delay in enforcing execution may be such as to imply laches, while unexplained, and to deprive the party of his prior right, but I do not regard this as a case of that kind.—4 Ea. 523.

With respect to the last point: One of the plaintiffs appeared at the sale, made no objection, and bid for the property, but was not the highest bidder. It was not shewn, however, that he knew at whose execution the property was sold, or that it would not produce enough to satisfy his debt as well as the others, nor does the inference necessarily arise that he intended to relinquish whatever claim he might have to be first satisfied out of the proceeds of the sale. We think, upon consideration, that by this act of one of the plaintiffs, in bidding at the sale, their legal claim was not compromised, and a new trial is therefore granted without costs.

SHERWOOD, J., (after stating the case).—In support of the rule for a new trial in this case the plaintiffs contended in argument—1st. That as their writ of attachment was the first one sued out and delivered to the defendant, they were entitled to a legal priority. 2ndly. That goods of the absconding debtor, having been seized by the defendant under their writ of execution, were in custody of the law, and could not be legally taken by the defendant under McKenzie's execution. There are two provincial statutes which have been enacted to authorize the issuing writs of attachment, the 2 Wm. IV. ch. 5 and the 5 Wm. IV. ch. 5. The plaintiffs' right to priority must depend upon the construction of the first act, because the second statute was not passed till the cause of action of the plaintiffs, if they have any, had actually accrued; but, as the second statute was made to continue and amend the first, it may serve to explain the intention of the legislature, when a doubt arises



as to the meaning of any clause in the former. As they are clearly acts *in pari natura*, they should be construed as one law, and therefore a part of the one may be taken to explain a part of the other.—Doug. 90; 1 T. R. 53; 3 T. R. 135. By the 1st section 2 Wm. IV. ch. 5, a creditor, who has made and filed an affidavit according to law, is entitled to a warrant of attachment, commanding the sheriff of any district to seize, take and safely keep all the property, both real and personal, within his district, belonging to the absconding debtor. By the second section, the sheriff, after seizing the property, must cause a notice to be inserted in the Upper Canada Gazette, stating that by virtue of such writ of attachment he has seized all the estate, both real and personal, of such debtor, and unless he return within the jurisdiction of the court from which the warrant issued, and put in bail to the action, or cause the claim of the plaintiff to be discharged, within three calendar months after such notice, all the estate of the debtor, real and personal, or so much of it as may be necessary, will be held liable to the satisfaction of the claim of the plaintiff. The 3rd section directs the sheriff to take into his charge and keeping all the property and effects of the absconding debtor. The 17th section enacts, that if no other warrant of attachment shall come into the hands of the sheriff, all the remaining property and effects, after satisfying any execution, shall be delivered to the agent &c. of the absconding debtor. In my opinion, the execution mentioned in this section means the execution of the plaintiff who takes out the first writ of attachment, because all the previous sections appear applicable to the proceedings of such a plaintiff, rather than the proceedings of a subsequent plaintiff; and I think the 6th section of 5 Wm. IV. strongly indicates that this is the same construction which the legislature themselves subsequently put upon the first act. It enacts, that when several attachments are taken out against the same absconding debtor, there shall be no priority of claim allowed, but each of the creditors suing out an attachment shall receive a ratable share of the proceeds of the property, in proportion to the amount of his claim, with a proviso, that if the estate



is not sufficient to satisfy the claims of all the attaching creditors, no share shall be allowed to any one who sues out an attachment after six months from the issuing of the first writ of attachment. From a consideration of both acts, I incline to think the reasonable conclusion from both of them is, that the legislature intended by the first statute to give a priority to the plaintiff suing out the first writ of attachment, and it remains to inquire whether the plaintiffs in this case have lost their priority by any laches, or by any implied dereliction of their right. I really can see no good reason to impute laches to them. Their writ of attachment was delivered to the defendant on the 19th October 1833, and, after seizing the property of the absconding debtor, it was indispensably requisite for the sheriff to give three calendar months' notice in the Upper Canada Gazette of the seizure, before the plaintiffs could take any further step. This might probably have occasioned a delay till the 25th January 1834, when the plaintiffs could have taken out a process, returnable in Hilary term, in the following month of February, but the practice of the court allowed them to file a declaration at any time before the expiration of the next term after the return of the process, which was in the following month of April; and had the absconding debtor himself appeared, by putting in bail, he could not have signed judgment of *non pros.* for not declaring sooner than that period. The plaintiffs therefore obtained final judgment against the absconding debtor as speedily as the established practice of the court required, and I think they cannot reasonably be held to be guilty of laches for not proceeding with greater expedition.

It is further urged by the defendant that the fact of one of the plaintiffs bidding at the sale under McKenzie's execution is sufficient evidence of abandonment of priority on their own writ of attachment; but, in my opinion, it cannot legally have that effect. Any presumption of that kind must be done away with by the undoubted fact, that the plaintiffs took their proceedings, in their suit under the attachment, with as much promptness as the rules of law demanded; and I think it cannot for a moment be supposed



they would have continued proceedings, if they intended to give up their right of priority to a subsequent claiming. In the absence of anything to the contrary, it is more reasonable to suppose they might have thought the sheriff had property enough to satisfy the claim of both, or that they had no right to interfere at all in the matter at that stage of the proceedings. The defendant was aware of the plaintiffs' writ of attachment being the first in order of time, and, I think, it was his duty to take notice of the proceedings upon it in this court; and, if he did so, he must have known they were in progress at the time of the sale. With a full knowledge of all the facts, how can it be reasonably asserted the defendant was misled by the act of one of the plaintiffs? And, if it be conceded that he was not, it appears to me that puts an end to the argument, as respects even the equity of this case. With respect to the second objection raised by the plaintiffs, to the legality of the defendant's proceeding to seize and sell the goods under McKenzie's execution—namely, that the goods of the absconding debtor, having been seized by the defendant under their writ of attachment, were in the custody of the law, and could not be legally taken under McKenzie's execution. I am inclined to think it sustainable upon general principles of law. I am not aware of any judicial proceeding in England precisely analogous to the proceeding by the writ of attachment against an absconding debtor, but the proceeding by foreign attachment in the city of London greatly resembles it, particularly at the commencement. Both are intended, in the first instance, to compel the debtor to appear and put in bail to the action of the creditor; but, if he does not do so, then both are intended to afford him ultimate satisfaction of his debt. In the case of *Fisher v. Lane and others* (3 Wils. 303), the court was of opinion that a foreign attachment was similar to the process in the courts of Westminster, by way of distraining issues to compel an appearance to a suit. I think the writ of attachment in this province is of the same nature. The defendant seized the property of the absconding debtor under the attachment of the plaintiffs, and it was in his custody, under the attachment, when



McKenzie delivered his *fi. fa.* to be executed. The seizing under an attachment is virtually a distress, as much as seizing goods to compel an appearance, or for damage feasant; and goods distrained for any legal purpose cannot be taken by the sheriff under a writ of *fi. fa.*—Dy. 67, B.; Willis, 131. I think, upon the whole case, the plaintiffs were entitled to recover, because the last act relative to writs of attachment, and the respective rights of plaintiffs under them, does not reach the present case. There should be a new trial, in my opinion, without costs, upon the ground of the verdict being contrary to law.

MACAULAY, J., gave no opinion.

*Per Cur.*—Rule absolute for a new trial, without costs.

#### DOE EX DEM. WILSON ET UX. V. WESSELLS.

When the husband of a feme, seized of lands in her own right during the coverture, signed a writing (not sealed) acknowledging that he had bargained and sold certain lands, and been paid in full for them, and afterwards, by letter, directed his name to be signed to a deed of the same land, which was done, the wife not complying with the requisites of the statute to depart with her estate, and the vendee entered and continued in possession as owner upwards of twenty years: *Held*, that the jury who tried an ejectment, brought by such husband, might presume a conveyance from him, and that during his life, at least, no ejectment could be sustained to dispossess the vendee or those claiming under him.

Ejectment for No. 26, in the first concession of Sophiasburg. At the trial of the cause at Picton, at the last assizes for the district of Prince Edward, the lessors of the plaintiff made title, by producing letters patent under the great seal, dated in 1803, granting the lot to Sarah Roblin, the wife of Wilson, they two being the lessors of the plaintiff. On the defence it was proved that one Gorman was the original nominee of this lot, and that at a very early period Sarah Roblin, then unmarried, had, in concurrence with her brother Stephen Roblin, purchased Gorman's right, each paid one-half of the purchase money, the patent was sued out in the name of Sarah Roblin, who was to transfer to her brother his half. The witness who proved these facts was employed by Sarah Roblin to negotiate the purchase for her, and he stated that Stephen Roblin, not long after, purchased from his sister her half for \$300, or upwards, paying \$100



down. In corroboration of this statement the defendant produced in evidence a receipt, signed by James Wilson, one of the lessors of the plaintiff, dated 1st January 1799, in these words:—"Received from Stephen Roblin, at sundry payments, to the amount of two hundred and fifty dollars, on a certain lot of land, known by the name of No. 26, Sophiasburg." Also, a writing signed by James Wilson, dated 17th June 1811, but not under seal, in which, for the consideration of \$360, therein acknowledged to be paid, he sells, bargains and conveys lot No. 26, in the first concession of Sophiasburg, with all its appurtenances, to Stephen Roblin, his heirs and assigns, for ever, and promises to give a more sufficient deed the first opportunity. It was proved by the subscribing witness to this writing, and by others, that Wessells, the defendant, went into possession of this lot in the year 1812, and has continually since resided upon it. The first actual occupant of this lot was Sarah Roblin (now Wilson), who lived on it for a short time; then her brother, Stephen Roblin, went into possession, in consequence, as it would seem, of his having made the purchase which the witnesses testified. He was an old man, without a family, and it was proved that Wessells, the defendant, in the year 1812 went to live upon the place, using and cultivating it as his own, and maintaining Roblin, who lived in his family till his death, which took place in December 1822. On 9th July 1812 James Wilson, being in Montreal, wrote a letter to his wife, which was proved at the trial, in which, among other directions about his affairs, is the following:—"Give Stephen Roblin his deed, sign my name, make every thing fair." Before his departure for Montreal he had procured a deed to be prepared for conveying this land to Stephen Roblin, in fee simple, and the deed was accordingly drawn in the form of a common bargain and sale, and left with Wilson before he went to Montreal. It was in reference to this deed that this letter was written, and upon the direction contained in this letter his wife executed the deed, and, at her request, the same person who had prepared the deed at Wilson's desire, signed Wilson's name to it, and it was regularly witnessed, and



on 10th June 1819 it was registered in the county register. Mrs. Wilson, however, had never been examined before a judge, and the certificate which the law requires in respect to married women was not indorsed on the deed. It was proved by the witnesses for the plaintiff, as well as those for the defendant, that Wessells had in 1812, and from thence to the present time, been in possession of the land, claiming it and holding it as his own. According to one witness, Roblin was regarded as ostensibly owning the place till 1814, when defendant went on the place upon an agreement to have the land when Roblin died, and to maintain him in the meantime. Soon after Roblin's death (in 1822) it appeared that Wilson, having ascertained that he had made no will, asserted that the land belonged to his wife (formerly Sarah Roblin); but this claim was resisted by Wessells, who continued upon the place. In 1824 Wilson sent a person to inform defendant that as Roblin had expressed to him his intention to let Wessells have half the lot, he would comply with this wish, and give him a title to it if he would relinquish the remainder. Wessells replied that he would have all or none. About eight years afterwards Wilson made a further proposition to convey half of the lot, and Wessells seemed sensible that his title was defective, and expressed a willingness to accept a deed of a part, but he afterwards declined. It was proved that Roblin was told it would be necessary to have Mrs. Wilson examined before a judge, but his reply was, that he did not care about her barring her dower, as she would never want a home there; from which he seemed to be ignorant that the examination was necessary to perfect his title.

The Chief Justice charged the jury, that it appeared to him that the title shewn to have been vested in Sarah Wilson by the letters patent was not repelled by shewing a legal assignment to the defendant, or to any third person. The writing signed in 1811 could not even carry Wilson's interest in the land, because it was not under seal, and of course it could not affect the title of his wife. The deed of 9th July 1812 was not executed so as to bind him, because, although his name was signed to it by his desire, there was



not that authority under seal which was necessary for empowering any one to execute it in his name. As to the justice of the case—whatever might be thought of the right of the wife (he did not speak of her mere legal right) to repossess herself of this land, after having deliberately executed a deed for transferring it to another, the absence of the judge's certificate clearly entitled her to disregard the deed altogether, and to treat the land as her own as fully as if she had never put her name to the instrument, because she was legally incompetent to act for herself. With respect to James Wilson, the husband, who was of course a free agent, it was difficult to understand upon what principle he could think it just to possess himself of this property, after having signed the receipt of 1st January 1799 and the paper of 17th June 1811, and after having written the letter from Montreal dated 9th July 1812. The ground on which he sought to obtain the land was, that neither he nor his wife ever sold or agreed to sell to Stephen Roblin more than an estate for life, and he adduced some parol evidence, though not very satisfactory, to that effect; but against this assertion there was not only parol evidence, strong and explicit, that he had frequently declared he had parted with the fee simple, and been paid in full for it, but there was the further fact, that the sum of \$360, acknowledged to have been paid was in truth the full value of the land at that early period; and, what was far more material than any parol evidence, either direct or circumstantial, there was his own express declaration in writing, under his hand, that he had sold it to Roblin, "his heirs and assigns;" and his letter imports nothing to the contrary: that the justice of the case seemed to him decidedly against the ejectment brought in the lifetime of James Wilson, to recover possession of a property which he was so clearly shewn to have sold; and, although the defendant could not make out a legal title in himself, or in any third party, by documentary evidence, on account of the defects mentioned, it remained to be considered whether a title had not been acquired under the Statute of Limitations, by the long possession, adverse to Wilson and his wife; or, 2ndly.



Whether, in support of the long and rightful possession of the defendant, a conveyance ought not to be presumed by the jury ; or, 3rdly. Whether, at any rate, Wilson should not be held to be estopped from bringing this action, contrary to his written acknowledgment that he had sold and been paid for the estate. That, with respect to the Statute of Limitations, Sarah Roblin, being married when the possession of Stephen Roblin commenced in 1812 or in 1814, when the defendant went to reside on the land and cultivate it, came within the exception of the statute, and her right was not barred ; but Wilson, being tenant by the courtesy initiate (there being issue), was under no disability, and was therefore bound to bring his action within twenty years.

It was much more than twenty years since Stephen Roblin entered as owner, not as a tenant to Wilson, but as a purchaser claiming to hold the land as his own ; but when he took the deed in July 1812, purporting to be a conveyance from Wilson and his wife, he must be held, as it seemed to him (the Chief Justice) to have recognized Wilson's title up to that time. From that period to the bringing of the action more than twenty years had elapsed ; but it was contended that the treaty for a part of the land, which took place in April 1832, and just before the twenty years expired, was conclusive evidence that Wessells was not then in possession, claiming the fee and disputing the title of Mrs. Wilson, but that he was, on the contrary, to be regarded at that time, by his own admission, as tenant at sufferance. That, with respect to the evidence on that point, he thought the jury should say whether the defendant meant, by anything that passed, to disclaim title in himself and to acknowledge Sarah Wilson as the real owner ; or, whether he was not acting solely under an impression, from the representations of Wilson, that his own title was informal by reason of a defect, of which advantage might be taken, and was therefore at one time desirous of securing a part, though he afterwards determined to maintain his right to the whole. In the latter case, the defendant could not be properly taken to have waived any advantage arising from his long possession of the land which Wilson and his



wife had sold. When the negotiation broke off, each party was remitted to his original rights. That whether the lien of Roblin, or the defendant as claiming under Roblin, could or could not be considered to have acquired a title under the Statute of Limitations, he instructed the jury that, in support of the long continued possession, they might presume a conveyance to Roblin. They found for the defendant.

In Michaelmas term the *Solicitor General* obtained a rule nisi for a new trial. *Bidwell* shewed cause. Judgment was now given.

ROBINSON, C. J.—If the plaintiff Wilson is barred under the statute, or if a valid conveyance could, under the circumstances, be presumed, or if Wilson is estopped on the evidence from bringing this action, then the rule which has been obtained for a new trial must be discharged.

I am of opinion that the verdict was proper, upon this ground (independently of either of the others), that the jury were warranted in presuming a valid conveyance, as against Wilson at all events, because it is shewn that more than thirty years ago he had alienated the land to Roblin, that he had been paid for it in full, and that twenty-five years ago he expressly undertook in writing to make a good title to Roblin, his heirs and assigns. From that time to the bringing of this action he took no legal steps to dispossess Roblin, or the defendant who succeeded him. What he ought to have done in 1812 it was right to presume he did in fact do, and he is on this ground, in my opinion, disabled now from recovering in this ejectment. In support of the justice of the case, the law allows this presumption to be raised, and the jury are not to be prevented from entertaining it upon any nice discussion of probabilities. In point of fact, there was great reason to believe that a valid conveyance had not been executed after the ineffectual one made in 1812, but the jury might nevertheless entertain the presumption, founding it on the long possession. There are strong cases in support of this doctrine.

SHERWOOD, J.—The wife of Wilson is the grantee of the crown of the land for which this action is brought. The



husband has a freehold and a right of possession of all the wife's lands of inheritance, and, by the common law, if he conveyed such lands in fee by deed of feeoffment with livery of seizin, such conveyance worked a discontinuance, and barred the entry of the wife after her husband's death, although the right of property always remained with her. Her only remedy in such a case to gain the possession was by the old writ of *cui in vita*, till the statute 32 Hen. VIII. changed the law, and gave her a right of entry to gain the possession immediately after the death of her husband.—Co. Lit. 326, a. & 356, a. Wilson had a freehold in the land, which he was capable of conveying for his own life; but it is objected that he did not in fact convey the estate for that time by the written instrument which he gave to Stephen Roblin, and which was given in evidence at the trial, because it was not sealed, and consequently is no deed. The objection, I think, is unanswerable. The statute 27 Hen. VIII. ch. 16, expressly declares that no estate of inheritance or freehold, or any uses thereof, shall be valid by reason only of any bargain and sale, unless the same be made by writing, indented, sealed and enrolled, &c., and therefore the freehold in the land could not be conveyed by the writing alluded to; but it appears by the same instrument that Wilson did in fact bargain and sell the land to Stephen Roblin for a large consideration in money, which he acknowledges to have received, and promised by the same written instrument to give him any further conveyance or assurance, if requested by Roblin, his heirs or assigns. There can be no doubt, therefore, that Wilson has no equitable claim to the possession of the land; but it is contended the general rules of the common law are in his favor, and that the action is fully sustained by the evidence, in consequence of the invalidity of the conveyance. The freehold, it is alleged, is still in him, and entitles him to the possession. The possession of the defendant seems not to have been adverse to the lessors of the plaintiff, and, for this reason, I think the defendant can derive no assistance from the provisions of the Statute of Limitations; but still, I am of opinion that Wilson has no legal right to the



possession. The heir of Roblin has all the estate which ever belonged to Wilson, and therefore the present action cannot be supported. After the death of Wilson, his wife or her heir may recover the possession by an action of ejectment by force of the statute 32 H. VIII. before mentioned.

I think the instrument in writing from Wilson to Roblin, containing both the bargain and sale of the land to the latter, together with an acknowledgment of the receipt of the consideration moving from him, creates a resulting trust in Wilson for the use of Roblin and his heirs. If these are articles for the purchase of an estate for a valuable consideration *bona fide* made, the vendor stands seized for the purchaser before a conveyance is executed.—Ca. Chan. 39 ; 2 P. W. 629 ; 2 Vern. 680. The writing from Wilson continues a promise on his part to make further assurance of the estate to Roblin : it therefore became his duty, as the vendor of the land and the trustee of Roblin, to make a valid conveyance by deed ; and I think such a conveyance on his part ought to be presumed, and that the facts of the case do not at all rebut the presumption. According to this presumption, the heir of Roblin would have the legal estate, and this is a good defence ; for if the defendant prove a title out of the lessor, this is sufficient, though he have no title himself. In the case of *England ex dem. Syburn v. Slade*, Bull N. P. 110, 4 T. R. 682, the court determined, that in case of a clear and plain trust, a conveyance may be presumed to the *cestui que trust* in a much less time than twenty years. It was held in that case that there could be no reason why a jury should not presume a valid conveyance to the party entitled to one from the trustee, because it was his bounden duty to convey ; and the same reason holds good in this case. There can be no doubt it was his duty to convey to Roblin ; and if the case should go to a second jury, they ought to presume he did. I incline therefore to the opinion that there should not be a new trial. Another jury could not correctly give a different verdict from the present.

MACAULAY, J.—It appears to me the defendant is entitled to retain his verdict. After the lapse of so many years



a jury might well be advised to presume a valid conveyance from Wilson to Roblin, or that an adverse possession for twenty years had been held, so as to bar the remedy under the Statute of Limitations, if the receipt and written conveyance in evidence could not of themselves operate to bind the plaintiff's lessor. I am not satisfied that livery of seizin could not be presumed to support the written conveyance of 17th June 1811, as a feoffment—1 Leo. 25; that is, if it is insufficient to conclude Wilson, as respects his interest and power over the estate, as husband of the owner. Of course his acts only bind during the subsistence of the coverture, or the continuance of his life. Upon his decease Mrs. Wilson, if living, or her heir-at-law, may in all probability make entry within the period limited by the statute, after the cessation of her present disability, by reason of the coverture, or his life estate, if so entitled by the courtesy of England. In the mean time, at all events, her husband is bound, if not by his own acts, by lapse of time, on the footing of a presumed conveyance, or an adverse possession exceeding twenty years in duration. As to the interest or powers of a husband over a wife's real estate during coverture, and the effect of conveyances by him during the continuance of the coverture, or his life estate, see the following cases—Co. Lit. 326 a, 351 a; Moore 171; 2 Bl. Com. 302: 1 Rol. 851; 1 Preston Ab. 334-5; F. N. B. 193; Com. Dig., Baron Feme E. & K., and Discontinuance A. 3.

The doctrine of disseizin is not involved in this case.

*Per Cur.*—Rule discharged.

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#### WRAGG V. JARVIS.

Judgment cannot be arrested, after judgment is given on demurrer.

A writ of *ca. sa.* issued from an inferior court valid upon the face of it, and in a case apparently within the jurisdiction, was placed in the hands of the defendant as sheriff of the Home district, upon which he arrested the party therein named. The prisoner, to relieve herself from close custody, applies for and obtains the benefit of the limits,



which are co-extensive with the limits of the city of Toronto. The plaintiff, under the recent statute, having satisfied the judge of the inferior court that the prisoner had acted, or was acting dishonestly in concealing or misapplying her effects, procured an order to the defendant to recommit her to close custody. The defendant was unable to find her, but whether she had withdrawn from the limits, or was concealed within them did not appear. The plaintiff then brought this action for an escape—relying upon the bare fact of the debtor not *being found*, as proof that she had *absconded*. The escape was denied. After a good deal of consideration, the court determined, for reasons assigned in their judgment, that the sheriff was liable as for a negligent escape, though no proof could be given that the debtor had actually left the limits. It was only shewn that after the order for her being committed to close custody, the sheriff being required, on twenty-four hours' notice, to produce her, failed in doing so. After the trial, and after judgment had been given on a demurrer in the cause, and after the time for moving for new trial according to the usual practice had expired, it was discovered by the debtor's counsel that the *ca. sa.* on which she had been arrested was void, being issued against an administrator, and without any affidavit whatever being made to warrant it, so that if it had been in an ordinary case it would be wholly void, as being directly contrary to the statute, which alone gives jurisdiction to the inferior court, and more especially when it was void the process was against the person of an administrator, who is not in ordinary cases liable to arrest. For this cause an order issued from the inferior court setting aside the writ and discharging the debtor, there being no affidavit such as the statute required. In Easter term last this court, differing in opinion, on the application by *Sullivan* to relieve the sheriff, the matter was left open without being finally disposed of, and now the judges delivered their opinions.

ROBINSON, C. J.—It is to be considered that the process was not merely irregular, but void, and an absolute nullity. The inferior court had not jurisdiction to grant such a pro-



cess without an affidavit. It is a court of limited jurisdiction, both as to place and cause of action—it is created by an act of the legislature, which defines and circumscribes its powers, and what has been so clearly done contrary to its duty is *coram non judice*.—Str. 994 ; 2 Wils. 385, 3-345.

The plaintiff, for suing out and using such process, is liable to false imprisonment, and so I apprehend is the sheriff for having executed it. The jurisdiction is not in this case to be assumed as against the debtor, for she never had the opportunity of denying it. That the debtor so arrested did ever actually escape is not proved. That the sheriff ever wilfully discharged her, or was guilty of any degree of negligence, is not surmised ; but he is held liable for this constructive escape of the debtor, because he could not find her when required. If he had succeeded in finding her, and had committed her to prison, she must, it is plain, have been discharged, and the plaintiff, instead of being allowed to retain her to satisfy the debt, would have been liable to increased damages for her false imprisonment. The irregularity which makes the writ void is one for which the plaintiff himself is the person directly responsible, and he cannot with justice complain of the consequences. The sheriff is not expected to search into the regularity of proceedings anterior to the writ. The court discountenances it by holding him liable for escape wherever the writ would protect him ; and by holding that the writ protects him, when legal, on the face of it. To this principle there is however one exception, when the proceeding is, as here, wholly void, as being *coram non judice*. But, although the sheriff may in such a case be left unprotected, he is not to be held guilty of laches by a plaintiff because he did not suspect and discover that the plaintiff had been so fatally illegal in his proceedings. The sheriff, in my opinion, cannot be treated by the plaintiff as being guilty of laches in assuming that the plaintiff's proceedings were not wholly void, and in treating them as legal, until the defendant, by obtaining an order for her relief, brought the defect to light—he has lost no time since in applying for relief. When he denied the escape, he did not knowingly



waive the illegality of the process, for it had not become known—he pleaded no sham plea, and urged no insincere defence—the question was new, and doubtful whether in such a case an escape would be presumed : and in resting thus upon the merits, and forbearing to pry into the plaintiff's previous proceedings, the sheriff's conduct was anything but vexatious. But now that it has been made manifest that the defendant was illegally in custody, is it nevertheless to follow that the plaintiff, while he remains himself liable to the debtor for false imprisonment, shall compel the sheriff to pay the debt, which he could not by this process have obtained from the debtor ; and this, not because the sheriff has either wilfully suffered, or, in fact, negligently permitted the debtor to escape from this illegal custody, but because he could not find upon the limits the debtor who was never legally confined there, and who, if found, must presently afterwards have been discharged ? Fortunately the debt is not large, but if it were of sufficient amount to entail ruin upon the officer acting *bona fide* in the discharge of his duty, we should feel great reluctance in persuading ourselves that there could be no relief.

For the sheriff, the defendant in this cause, it is suggested—1st, that judgment may be arrested ; 2nd, that a new trial may be granted ; 3rd, that proceedings may be stayed on such terms as the court thinks equitable. As to arresting the judgment—that would be on the ground that the declaration contains no averment of an affidavit being made and filed to warrant the *ca. sa.* But I am of opinion that to arrest the judgment would not be proper at this stage of the cause. Such an application rests on grounds of strict legal right—it involves only the apparent sufficiency of the pleading, and cannot be helped by anything extrinsic. It is contrary to established principles to arrest judgment after the plaintiff has had judgment in his favour on demurrer, which is the case here ; and there is nothing to bring this case within the reason of any exceptions to this strict rule, which it seems to be admitted in the case of *Creswell v. Packham*, 6 Taunt., 450, might possibly be admitted. Moreover, the pleadings only shew a want of



the averment that an affidavit was made and filed—they do not disclose to us (what we know *aliunde* to be the fact) that in reality there was no affidavit; and while we look at the whole record, and look no further, we ought, I think, rather to entertain the presumption that in truth there was an affidavit, although the plainiiff has omitted to aver it, because the defendant has rested on the denial of the escape expressly admitting that the defendant was in his custody by virtue of the execution; and this is another strong reason why judgment should not be arrested for the defect in the declaration.

Then, as to granting a new trial: the rule of practice is very strict against allowing a new trial to be moved after the four days of the ensuing term, and though I do not doubt the power of the court to do it—Doug. 173—my opinion is that we ought not—1st, Because of the inconvenience of the precedent; and 2nd, Because there seems to be no adequate motive for breaking in upon a rule which is observed with peculiar strictness, since there is in fact no occasion for a new trial—there being nothing to try. That no affidavit was made or filed is admitted in the argument: that fact cannot be altered, and it is not affected by any question that may be made as to the power of the judge of the inferior court in vacation to make the order for setting the execution aside. It was always void; it required no setting aside, and cannot again be set up. And, as to these two questions of arresting the judgment, or granting a new trial, it appears to me that in deciding upon them we cannot properly be governed by considerations arising out of the defendant's peculiar situation as sheriff. Rules of pleading, or of practice, are, I apprehend, to be enforced or relaxed upon general principles applying equally to all plaintiffs, and all defendants, and it would be better to leave this defendant to sustain the weight of this verdict, which is not large, than to attempt to relieve him by infringing upon rules which are not understood to be properly open (except perhaps in some very extreme case) to the discretionary indulgence of the court. The question then that remains, is, whether relief can be properly afforded to



the sheriff by staying proceedings on payment of all the costs which have accrued?

That the plaintiff has no right in equity to recover his debt of the sheriff is certain. If he recovers his costs no injustice is done him. In exercising upon equitable principles a control over their own proceedings, in order to obtain substantial justice, the courts have shewn a strong disposition to act liberally. It is difficult to say that they admit any rule of practice to be inflexible when they are applied to upon such grounds. It is stated to be a general principle, that whenever a party would be entitled to relief on *audita querela*, the court will grant him relief summarily, on motion, except when the ground alleged is disputed and doubtful. It may be contended that this principle holds also inversely, and that the court will relieve summarily in these cases, *only* where the party could have remedy upon an *audita querela*; but clearly it is not so, for the courts do frequently relieve upon grounds which never could be relied upon on *audita querela*. It can be only matter of strict legal defence that can be urged in pleading in *audita querela*, such as if it had been open to the party before pleading would have availed him in bar. If anything else were to be set up, the plaintiff could demur. But it is hardly necessary to say that the court do frequently interpose and stay proceedings summarily for causes which could not avail a defendant in pleading. Still, as the two methods of proceeding are clearly connected in their nature, or rather in their object, we must consider further, that it is a principle, and I believe an invariable one, that a party cannot be relieved by *audita querela* for any matter which he might have urged before, or at the trial. This follows from the fact that it is a strictly legal proceeding, in which no indulgence is asked or granted. If the party can be relieved by *audita querela*, he is entitled to it; the court have no discretion. It falls therefore within the same rule as pleading *puis darrein continuance*, or pleading to a *scire facias* where no defence can be advanced, which in the one case could have been pleaded before the last continuance, or which, in the other case, could have been pleaded in bar to the original action.



But it is not correct to say that the court, acting in the exercise of their discretion, and in furtherance of justice, will never grant relief summarily on motion, on a ground which the party might have availed himself of by pleading, or otherwise, in an earlier stage of the cause. Undoubtedly such a principle, as a general rule, pervades all the proceedings of the court, and it is just it should; but it is not inflexibly maintained in all cases, when the court are desired to protect parties against injustice by a summary interposition of their control over their own proceedings. Not a few cases are found in the books where the courts have granted a new trial expressly to enable a party to plead a defence, of which, by an inadvertence of himself or his attorney, he omitted to avail himself in the proper time. Of course this will be done only in strong and favorable cases, to prevent manifest injustice, and where no injustice can be occasioned to the other side. I see no substantial difference between granting a new trial to let in a defence which is disputed, but which if found must be conclusive against the plaintiff, and staying proceedings on a ground which is not disputed by the plaintiff, and which is in its nature equally conclusive. Then it will be found, especially in cases against bail, (I do not mean bail to the sheriff, where the court have an equitable power expressly given to them by the statute), but against the bail to the action; that the court have repeatedly stayed proceedings upon motion upon equitable grounds, and for irregularity, where the bail have not applied at the earliest moment, and they have sometimes stated, when the lateness of the application has been urged as an objection, that the consequence of that falls on the defendant, who is made to pay the costs of the proceedings. When the principal has been taken in execution, the bail may plead this in discharge of themselves; and it is suggested in a note of Sir Henry Gwillim to Bacon's Abridgment, *Audita Querela B.*, that if by *accident they omit to plead it*, the court, on motion, would set aside the execution issued against the bail.—1 N. R. 251; 2 M. & S. 238; 3 B. & C. 112; 6 Taunt. 492.



The court always shews a disposition to protect the sheriff when he has acted *bona fide*, and there seems indeed no good reason why the sheriff, acting in execution of the King's writ, where he has been guilty of no default or neglect, either in discharging his duty, or in defending himself, should not be as liberally protected against harsh and unjust consequences as bail, who have voluntarily become answerable for another person's default.—7 Taunt. 297; 1 Moore 43; 3 B. & A. 696; 3 Camp. 348. If at any time during this suit, the plaintiff in the original action had received satisfaction of the debt and costs, the court, I conceive, would interpose and relieve the sheriff; and it comes within the same reason when the plaintiff seeks to render the sheriff liable on account of what has been done or omitted in respect to a process of execution, which from the first was illegal, and absolutely void. If indeed the sheriff, from any idea that the debtor was not legally in custody, had taken upon himself to discharge him, or had connived at his escape, there would have been no excuse for his not having relied at the proper time on the supposed irregularity, and availing himself of it in the proper manner; but obeying the process as he did, and always meaning to obey it, it is not to be imputed to him as laches that he did not discover its illegality before it had been pronounced in the cause in which it was most properly examinable.

On the whole, it seems to me to be a general principle, that the court can control its own proceedings by staying a cause, when it is either brought or proceeded in contrary to good faith, and when the ends of justice manifestly require it; that it does, however, govern itself by certain restrictions in the exercise of this power, and will not in general grant such relief, unless it be applied for in reasonable time, nor when the defendant, by the course he has taken, can be fairly considered to have waived the ground on which he afterwards moves; that the rule as to applying at the earliest possible time, however, is not always rigidly enforced, but the court can, and will, in their discretion, admit exceptions to it; and that although I do not find



a case under circumstances like those before us, where relief has been so afforded, I can see no good reason for not considering this as coming within the same reason as many exceptions which may be found to this rule: and I am therefore of opinion that upon payment of all costs, further proceedings in this action should be stayed, unless indeed the plaintiff should prefer assenting to a new trial on payment of costs, in which case the defendant may in a formal manner avail himself of the illegality of the process, if the plaintiff, for any reason, desires that he should do so.

My brothers, I believe, continue of the opinion that after the trial, and after the time for moving against the verdict, proceedings cannot be stayed for a cause which existed in fact at the time of plea pleaded, and there is much in the books, particularly in older cases, to lead to that conclusion. I have found nothing more expressly bearing upon the point than the case of *Spencely v. Marshall*, *Ld. Ray*, 704; but besides that the courts were not then so liberal in granting relief in furtherance of justice as they now are, there is a wide difference between the facts of that case and the present, and a difference that, I think, would clearly affect the claim of the sheriff to relief. Indeed, I have no idea that the motion made in that case would have been more successful at the present day, for the *Marshall* who was then charged with the escape must have known that the proper entry of the render of the debtor in the *Marshall's* book—that is, in his own book—had not been made. He could not have been ignorant that the party had not been placed in his custody according to the practice. The irregularity (and it was a mere irregularity) was one of which he, of all others, must have been peculiarly cognizant, and the court therefore naturally said that it seemed to be a trick to keep it in secret, to set aside a verdict, if it was not according to the defendant's desire.

SHERWOOD, J., stated that he adhered to the opinion expressed by him last term.

MACAULAY, J.—Bearing in mind that this verdict is only for 20*l.*, and not susceptible of any appeal, I have not been able to satisfy myself that the defendant ought to be re-



lieved at this late stage of the proceedings, or on this application. If the process against the defendant in the former suit was void, the sheriff would not be liable for the escape, though a contrary rule prevails where it is merely erroneous or irregular. But such defence should be urged at the proper period, by plea or in evidence, at the trial. No sufficient matter of defence, existing previously to that plea, could be pleaded *puis darrein continuance*, and after the trial the latter plea is not admissible. If the *ca. sa.* now in question is void, it must have been so *ab initio*, and the fact existing the matter ought to have been shewn at *Nisi Prius*, or suggested upon the argument of the demurrer; and I fear an inadvertent omission to search minutely into the proceedings, until after the decision of this court upon the special case and demurrer, will not enable the court to look back for the defendant's benefit. The subsequent quashing of the *ca. sa.* by the district court is immaterial; if it was void, it never could have had any legal existence. Had it merely been erroneous or irregular, it would have been a different case; and coming at a period at which the defendant could not avail himself of its rescission at the trial, it would be open to the court to consider whether he should not be relieved on motion under the circumstances of the error or irregularity inducing the court below to set aside the process; and if the defendant could obtain relief by *audita querela*, or even perhaps in error, it would be of course to stay proceedings on a summary application. But if void from the first, the act of the district court in setting it aside was an act of supererogation, and inoperative. Ignorance of its being so void does not seem a sufficient reason for admitting the objection to prevail now. The sheriff, however, excused from the sufficiency of a party's proceedings previous to arresting under his process, or however justifiable in arresting, and even detaining a debtor, though such process be void or voidable. I apprehend that when called upon to answer for an escape it behoves him to do so, and, like any other defendant, to collect the materials for his defence, and to use them at the proper period, with equal vigilance, and subject to the like



consequences in the event of omission, whether such omission be inadvertent or designed.—8 Co., 142; 1 Wil., 98; 2 Wil., 385; 3 Wil., 345; F. N. B., 104; 1 Sal., 93, 264; Ld. Ray. 591, 1295; 2 Bl., 1183, 4; Str., 197, 1075, 4 Leon., 24, 36; 4 Mod., 14, 314; 4 Ea., 310; 4 Taunt., 631; 6 Taunt., 190. The court often goes great lengths in favour of bails and of sheriffs likewise, but then it is upon principles peculiarly applicable to them. When brought into court by process, and called upon to plead to a declaration filed, I apprehend they are treated like other parties in other suits. The bail are indulged in surrendering their principal after a default, and the sheriff is protected from attachment when no culpable default is imputable to him. So when bail are proceeded against on their recognizance by *sci. fa.*, and a default obtained by *nihils* returned instead of a *scire feci* or actual notice—they have been held entitled to object in error, or to be relieved on *audita querela*, on grounds that would not have availed them had they actually appeared or pleaded.—Cro. Jac., 645, 6; Sal., 273; Yel., 42; 2 Buls., 60; 8 Mod., 280; 8 T. R., 222; 3 B. & P., 13; 15 Ea., 254; 3 B. & C., 112; 4 D. & R., 712; 5 B. & C., 244.

I have not been able to satisfy myself that a motion in arrest of judgment, after a judgment on demurrer, can be entertained in the same court, unless after the trial, or some subsequent proceedings, the state of the record shall have been changed so as to present some new question, arising out of an altered state of the facts. Upon the same record, after judgment on demurrer, *transit in rem judicatam*—and it is a rule of proceeding, that all objections existing at any particular stage of the cause must be urged, or shall be considered as waived; and after a matter is once deliberately decided, the court will not allow the proceedings to be directly or indirectly revived at ulterior stages, or upon renewed motion. This I take to be the most satisfactory ground for concluding the parties after the decision of a demurrer. All objections then open should be made, and if not made they are regarded as abandoned; and at all events judgment having passed on the pleading, its suffi-



ciency cannot be reviewed on the suggestion of fresh exceptions, that might and ought to have been detected and urged originally; this is a more satisfactory reason than to say that the court will not allow themselves to be informed by an *amicus curiæ* that they have done wrong. The latter is an argument for this rule, not the only or best reason.

*Per Cur.*—Rule discharged.

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#### SMART V. STUART.

Were the plaintiff declared in an indenture of lease, not setting out any covenant for quiet enjoyment, (the lease itself in fact containing none,) and assigned as a breach that the defendant had hindered the plaintiff from entering on the demised premises at the time when the term commenced, and hath continually since kept him out; to which the defendant pleads merely a denial of having hindered the plaintiff from entering and enjoying, and the jury on this issue found for the plaintiff. The court refused to set aside the verdict—holding that there was an implied covenant for quiet enjoyment, and that proof of the defendant's refusing to give possession to the plaintiff, amounted to a breach of it.

The plaintiff sued the defendant in covenant. His declaration set forth a demise of certain land by defendant to plaintiff, to hold for ten years, at an annual rent, containing several special stipulations respecting improvements to be made on the premises. It was not stated that the lease contained any covenant for quiet enjoyment, but the breach assigned was, "that the plaintiff had not peaceably and quietly occupied, possessed and enjoyed the premises, according to the tenor and effect of the said indenture; but that on the contrary, the defendant hindered and prevented the plaintiff from entering on the said demised premises at the time when the said demise commenced, and from thence hitherto wholly kept the plaintiff out of the possession of the said demised premises contrary to the tenor and effect of the said indenture, and of the covenant of the said defendant in that behalf made as aforesaid."

The defendant answers that he did not hinder or prevent the plaintiff from entering on the demised premises at the time when the demise thereof to him commenced, and hath not from thence hitherto kept plaintiff out of the possession of the said premises, contrary to the tenor and



effect of the said indenture ; and at the trial before Mr. Justice Sherwood, at the last assizes for the Eastern district, it was objected that the plaintiff could not recover, because a covenant to permit the lessee to enter could not be implied, and if it could, the plaintiff should have declared on the indenture according to its legal effect, and should have set out such a covenant whereas no allusion is made to any covenant of the kind, except in stating the breach. The indenture in fact contained no covenant for quiet enjoyment, or that the plaintiff should be permitted to enter.

A verdict was taken for the plaintiff, subject to the opinion of the court on these objections.

ROBINSON, C. J.—I am of opinion that the plaintiff is entitled to recover. The defendant by his deed demises the premises to hold for ten years from a certain day—viz., the 1st of April following the date—and I think that covenant lies upon the demise, not merely after ouster and eviction when the lessee has entered, but upon an implied covenant that he shall be permitted to enter and enjoy where he has never been allowed to enter into possession. The old cases are not consistent certainly, but upon a review of them they lead to this conclusion. I refer particularly to Sid. 429, 1 Ventr. 45, S. C. better reported ; Owen 105—bearing in favor of the defendant's objection on this point ; and to 1 Show 388, Hob. 12, 2 Keb. 569, and 6 T. R. 458, as establishing, in my opinion, the contrary doctrine, and shewing that a covenant that the lessee may enter and enjoy may be implied, and an action sustained upon it if the lessee has been prevented from entering and enjoying. The principle is stated broadly in one of the cases in Keble, "that the law makes a covenant whenever the party will contravene his agreement by deed," and nothing can be clearer than that the lessor agreed by this demise that the lessee should enter on the 1st April, and enjoy possession from thence for ten years. With respect to the other objection, that if such a covenant is raised by the deed, it ought to have been stated, it seemed to me, upon the argument, that the plaintiff ought to have pleaded the deed according to its legal effect, and that he ought not to have omitted all



statement of a covenant until he came to the breach—2 Ventr. 145 ; 4 Mod. 149 ; but it is quite clear that the cases of *Siddon v. Swate*, 13 Ea. 63, and *Duke of St. Albans v. Ellis*, 16 East, 352, fully sustain such a mode of declaring as the plaintiff has adopted here. It is moreover to be considered that the defendant by his plea has tendered an issue upon the breach—neither denying the existence of the covenant, nor objecting that it was not directly averred.

SHERWOOD, J.—This action is brought upon a covenant supposed to be implied in the word demise. The lease was made to the plaintiff by the defendant, by deed of certain premises, for a term of years, to commence on a day stated in the lease, and on that day the plaintiff demanded possession of the houses, lands, &c., so demised, and the defendant refused to give it, which refusal is the only breach of covenant assigned in the declaration. At the trial of the cause, I thought there was no implied covenant to give possession, and I still incline to the same opinion. The word demise implies a covenant for quiet enjoyment, and that the lease is valid, and not void or voidable. A breach of the covenant for quiet enjoyment, either expressed or implied, occurs where the lessor does any act of annoyance to the occupation of the premises, which prevents the lessee enjoying his property in so ample a manner as he is entitled to do by the terms of the lease—as by eviction, or by erecting buildings on the premises for his own use ; but the act so done, whatever it be, must be in the assertion of a title in himself, and not a mere tortious act, without any claim of title, for which an action of trespass would lie by the lessee. It appears by the case of *Pomfret v. Recroft*, 13 Ea. 72 ; Sid. 21 ; 1 Taunt. 321, that a mere nonfeasance is not a breach of the covenant for quiet enjoyment ; there must be a misfeasance after the lessee is in possession in the way of disturbance in the title. The plaintiff in this case was never in possession, and the defendant's refusal to give him possession was a nonfeasance, and his remaining in possession was a tortious act ; but the plaintiff had a legal remedy. He might have brought ejectment, and then trespass for mesne profits after recovering the pos-



session ; it was not necessary even to make an entry for that purpose.—Bull, N. P. 103 ; Doug. 485. The covenant for quiet enjoyment, according to the case of *Ludwell v. Newman*, 6 T. R. 459, means that the lessor agrees to give the lessee a legal right of entry into the demised premises, as well as the peaceable possession of them after entry. When the lessor has made a previous lease of the premises to a stranger, and the second lessee cannot lawfully enter nor support an action of ejectment on his lease against the tenant in possession, that case is an authority to shew that an action for breach of covenant for quiet enjoyment lies. In that case it was proved that the plaintiff had previously brought ejectment, which failed, in consequence of a paramount title. In principle, therefore, that case is precisely similar to the others I cited before. It was the want of title upon which the court rested their judgment. In the present case the title to the plaintiff is perfectly valid, and he might have obtained possession by legal means ; and here lies the difference between this case and that of *Ludwell v. Newman*.

As there was no covenant, either express or implied, to give up the possession, I think the plaintiff cannot support this action, but should resort to that of ejectment. When the law gives a specific remedy for wrongfully holding the possession, it is certainly unnecessary to resort to an implied remedy, even if it were practicable, but I think it is not, according to the principles of all the cases.

MACAULAY, J.—The indenture of lease set out shews a right of entry in the plaintiff on the 1st April 1835, on which day he went upon the premises and demanded possession, which was refused by the defendant. The language of the demise imports in law a covenant for quiet enjoyment, and the cases seem to establish, that, though not declared on specially and in due form as a covenant, yet, if upon the face of the declaration an implied covenant in law exhibits itself, the court when called upon must take notice of the same, and allow the benefit thereof to the party, judging of the instrument set out on the pleadings according to its legal operation and effect. If so, a



covenant for quiet enjoyment results upon the face of the record, and the plaintiff has assigned a breach. The only remaining point is, whether the facts alleged and proved by way of breach in themselves amount to a breach of the implied covenant for quiet enjoyment; and it appears to me that they do. A refusal in the lessor to deliver possession to the lessee upon his entering upon the premises and demanding it, would constitute a breach of such covenant, upon a principle similar to that on which it was decided that a prior lease or incumbrance would have that effect, though the lessee never entered. The covenant is, that the plaintiff should securely enjoy, without the let, suit, interruption, hindrance, or *denial* of the defendant, and a *denial* is proved.—6 T. R. 458.

*Per Cur.* (SHERWOOD, J., *dissentiente*)—Postea to the plaintiff.

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WOODRUFF V. CAMPBELL.

It is no ground for a new trial, that a witness who was subpoenaed did not attend, having been engaged on some public works.

*Sherwood, H.*, obtained a rule nisi for a new trial in this case, after the verdict for the plaintiff, on the ground that a witness, very essential to the defence, could not attend. It was shewn that the witness had been regularly subpoenaed, and that he was not detained by illness, or any cause that made his attendance impossible; but merely, that being one of a board of commissioners for a public work, his presence would be required in another part of the province, and the public service would receive detriment if he obeyed the subpoena.

*Draper* shewed cause.

The court said they could not set aside the verdict on this ground. It would be setting a dangerous precedent. It was the duty of a witness, when subpoenaed, to obey the process; and if he failed, the party who suffers in consequence must take his redress against him. There would be no security or certainty in the administration of justice, if a new trial were to be granted on account of the absence



of a witness, who, being subpoenaed, had it in his power to attend, but chose to give the preference to some other call of duty or business.

*Per Cur.*—Rule discharged.

### DOE EX DEM. SMITH V. ROE.

Service on a person (not shewn to be a servant of the tenant) on the premises claimed in ejection, explaining the meaning and intent thereof, held insufficient, without shewing the tenant had received it.

The tenant in possession in this suit being an unmarried man, the declaration was served by leaving a copy with a grown-up woman living in his house, and explaining to her the meaning and intent of the service. It was sworn that his brother, who also lived in the same house with him, was informed of the declaration having been so served, and that the intent and meaning of the service was explained to him. It was not shewn that the woman was servant of the tenant in possession, but merely that she resided in his family.

The court determined that they could not recognize the service, because it was not shewn that the tenant ever received the declaration, or acknowledged having received it,—and they discharged the rule which had been granted.

### CROOKS ET AL. V. LAW.

A plaintiff may recover on an express promise to pay a specific sum, though such promise were made on the occasion of presenting the account due to the defendant; no admission of which account could, according to the statute 2 Geo. IV., c. 13, 1821, be received in evidence, the account rendered being in New York currency, and the books from which the account was taken being also kept in that currency.

The defendant had dealt with plaintiff's testator as a merchant, and an account had been rendered in which the items were charged in New York currency, but at the foot of the account the sum due was turned into provincial currency. When this account was rendered the clerk or agent of the plaintiff who delivered it, conversed about it with the defendant, who not disputing the account said, "I



can't pay you all, but I will pay you two or three hundred dollars in a few months." No account was produced in evidence, but it was proved that the one delivered was transcribed from the testator's books, which were kept in New York currency. It was objected that our statute of 1822 ch. 13 prevents the plaintiffs from recovering by excluding the evidence of admission of the account which had been stated in New York currency. The second section of the statute enacts, "that after the first of July 1822, no rendering of any merchant's or other account entered and made out after that date within this province shall be considered a demand, nor shall any admission of any such account be given in evidence as an acknowledgment of a debt; unless such account shall have been entered, made and rendered in provincial currency at five shillings to a dollar." And in the following section it is enacted, "that no shop book of any merchant or tradesman made up and kept within this province shall be received in any court of law as evidence for such merchant or tradesman, as far as respects any entries made therein after the said 1st July 1822, unless such entries shall be made therein in provincial currency as aforesaid.

Upon this objection the plaintiffs were nonsuited, with leave to move; and a motion was accordingly made by them.

ROBINSON, C. J.—The second clause is express against receiving in evidence any admission of an account as an acknowledgment of a debt, unless such account has been entered, made and rendered in provincial currency. Whatever, therefore, may be the amount of this account, and I believe it is considerable, the plaintiffs clearly cannot recover by shewing that acknowledgment of the account. If it were not for this objection, the plaintiffs might properly have received a verdict for the balance of the account rendered, for it seems that the defendant tacitly at least admitted its correctness. But it is too much to hold that because the plaintiffs cannot recover the amount of the account upon evidence of its correctness being acknowledged by the defendant, they cannot recover any less sum



upon proof of a distinct promise to pay such sum in part of the account. Here the defendant, talking of the account, said he would pay \$200 or \$300, in a few months. This is "no admission of the account given in evidence as an acknowledgment of a debt;" it is a distinct promise to pay a sum named—good evidence, I think, upon an account stated. If proof of the account were relied on, it would establish a claim to a much larger verdict.

The statute, though passed to remedy an inconvenience, is penal in its operation, for it may, when it is enforced, result in the total loss to the creditor of an honest debt. It would not be proper therefore to stretch it, by any latitude of construction, beyond the strict import of its language: but to give it the effect which the defendant desires, would be to say that a plaintiff shall not avail himself of a promise made by his debtor to pay him a stated sum, if such promise shall be shewn to have been made in the course of a conversation about an account rendered in provincial currency. It was proved here that the plaintiff's testator, as a merchant, had had dealings with the defendant, and had an account against her; that conversing about this account, she promised to pay \$200 or \$300 in a few months. This promise is not an admission of the account, but an admission that she had dealings to the extent stated. I conceive it to be a good promise to pay \$200 or \$300; and therefore I think the nonsuit granted on this objection should be set aside. Although an express admission of this account rendered could not have been received in evidence as an acknowledgment of a debt to that amount, yet the promise to pay an express sum, admitted by the debtor in terms to be due, may be enforced as a distinct admission that she had got goods to that amount, and a promise upon good consideration to pay the sum named.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—The statute is penal in its operation, and it is not necessary to construe it literally when injustice would follow. Upon the evidence, the plaintiffs are not entitled to recover the amount of the account as being admitted—the act declaring that no admission of such an



account shall be given in evidence as an acknowledgment of a debt ; but a promise to pay a sum of money superadded, or independently made upon a valid consideration, would seem to form a case beyond its provisions. Here was ample consideration for the promise to pay \$200 or \$300 ; and it may well be separated from the admission of the account, so as to enable the plaintiffs to recover, not upon an implied promise in law resulting from an admission of the account, but upon an express promise in fact to pay \$200 or \$300 in consideration and on account of a debt previously acknowledged to be due ; not because she admitted the account simply, but because she promised to pay a specified sum. There is, however, room to doubt touching the construction of the statute as applied to this evidence. That adopted accords with the justice of the case. Many cases under the Statute of Limitations shew that though the acknowledgment of a debt may be evidence of a promise to pay it, yet it is not in itself a promise to do so. The admission of an account may be one thing, and a promise to pay the whole or a part of the amount of such account another thing. In this instance the promise would want consideration and be *nudum pactum*, unless the admission of the account be adopted as the consideration, and I think it may be so adopted. Notwithstanding the acts prohibit a recovery as upon an account stated or an acknowledgment of the account and implied promise in law, yet a sufficient moral obligation to pay the debt remains to support an action upon an express promise. The decisions under the Statute of Limitations, insolvent acts, and many other positive legislative provisions, amply shew that, though under certain circumstances all right of action may be denied or taken away, yet that a sufficient consideration may continue to support an express promise to pay, and to give a remedy by reason of such promise that did not previously exist and would not otherwise have accrued.

*Per Cur.*—Rule absolute.

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## CLEMENT V. SHRIVER.

The stat. 4 Will. IV., ch. 1, sec. 53, does not authorize a writ against a mere tenant at will, though he continue to hold after notice to quit and demand of possession. The statute extends only to tenants holding after the expiration of *their term*.

*Bell* moved for a writ to commissioners to inquire whether one Shriver does not wrongfully hold over a town lot in Niagara, of which Lewis Clement is owner. The affidavits stated that McDonell, a farmer, owner of the property, had let Shriver into possession thereof under a verbal agreement that he should keep the brewery and premises in order and repair, and should immediately give up possession thereof whenever he should be requested by McDonell to do so, without paying any rent for the premises: that, through several assignments the property had come by purchase to Clement: and that on demand in writing to give up possession Shriver had refused to do so.

*Per Curiam*.—The statute 4 Will. IV., ch. 1, sec. 53, applies in cases where tenants hold over wrongfully after *their term has expired*. A term must have been created by a demise, verbal or in writing, and it is expressly directed that the jury to be summoned shall say, upon their oaths, whether the person complained of was *tenant* to the complainant for a *term* which has expired. In this case there was no term, and in fact no tenancy as between Clement and Shriver, for the assignment by McDonell determined the will. It might be reasonable to extend the remedy to clear cases of tenancy at will, as well as where there has been a term, but the court cannot do it. The act as it stands does not admit of it.

*Per Cur*.—Writ refused.

## MALONE V. HANDY.

Payment of the weekly allowance, after a defendant in custody has filed his answers to interrogatories, is a waiver of any objections to the answers; and the plaintiff has no right to file further interrogatories without leave of the court.

An application was made at chambers to discharge the defendant, a prisoner in execution, for non-payment of the weekly allowance. The rule ordering the weekly allow-



ance had been served 18th February 1836. On 12th March, the plaintiff filed interrogatories, to which answers were filed by the defendant on the 22nd April. No payment of the allowance had been made in the interval, but on the Monday after the 22nd April the five shillings were paid. On 30th April the plaintiff filed further interrogatories, but he continued to pay the allowance on each successive Monday afterwards until Monday 6th June, when no payment was made. The defendant did not answer these last interrogatories; and on 17th June he applied to the Chief Justice at chambers for his discharge. The plaintiff then objected—1st, because he contended the first interrogatories had not been sufficiently answered; 2nd, because no answers had been filed to the second interrogatories filed on the 30th April. The defendant insisted—1st, that the plaintiff had no right to file additional interrogatories, at least without order or leave of the court; and 2ndly, that by continuing to pay the allowance after he did file them, he waived them, and cannot capriciously revert to them, and rely upon them as an excuse for making no payment. Term being at hand, the Chief Justice reserved the case for the consideration of the court.

The court decided, that by his payments made after 22nd April, the plaintiff must be taken to have admitted the sufficiency of the answers to the first interrogatories; and waived also the receiving any answer to his second interrogatories, for he continued his payments to the 6th June. They held further, that the plaintiff had no authority to put the defendant to answer additional interrogatories.

The defendant was therefore discharged.

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#### COPPING V. McDONELL.

The court will not give any direction as to how a plaintiff must proceed, who removes his cause from the district court into the K. B. by certiorari.

This action being commenced in the district court, the plaintiff, after declaring and before plea filed, removed the case by certiorari into this court; and now applied to the court by his counsel to know what should be his next



step—whether he was to continue the cause from the last proceeding, as of course, or begin *de novo*.

The court declined advising him, telling him he must proceed as the law and practice warranted, and that they would give no previous direction.

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MICHAELMAS TERM, 7 WILL. IV.

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WILCOX v. MONTGOMERY.

In trespass *qu. cl. fregit*, and for taking, cutting and carrying away hay and corn of plaintiff's, and converting, &c., the plea of *liberum tenementum* is not a sufficient answer on demurrer.

Trespass *qu. claus. fregit*. In the third count the plaintiff charged the defendant with breaking and entering his close, which was described by abuttals; and (among other things) with mowing, cutting down, and carrying away the grass and corn of the plaintiff; and seizing, taking, and carrying away the same, and converting it to his own use. To this *liberum tenementum* was pleaded, and the plaintiff demurred, specially assigning for cause, that the plea of *liberum tenementum* is no answer to the seizing, taking, and carrying away the hay and corn of the plaintiff, and converting them to defendant's use, as complained of in that count.

ROBINSON, C. J.—Upon consideration, I think the plea is no answer to that injury, and that the plaintiff, therefore, is entitled to judgment on the demurrer. The defendant, in his plea, undertakes to answer every injury complained of in the third count; and if he does notwithstanding leave any substantial cause of action unanswered, which is therein declared upon, then no doubt his plea is bad.—5 B. & A., 220. The seizing, taking, and carrying away the hay and corn of the plaintiff, as it is alleged in the third count, is a substantial cause of action, and cannot be treated merely as aggravation.



The only question therefore, is, whether this alleged injury is justified by pleading that the freehold of the *locus in quo* is in the defendant. As to this, the authority in 1 Roll. 406 is in point, which says that where a declaration was in trespass *qu. cl. freg.* and for taking timber, a plea making title to the close, *and not answering as to the timber*, is bad ; but if the plea shew the timber to have been *there growing* it is sufficient.

We must consider then, whether it is the plain intendment of the plea in this case, that the hay and corn were the same grass and corn which the defendant is charged with having unlawfully cut from the premises in question ; or whether it may not as well (consistently with the language of the count) have been hay and corn grown elsewhere, and of which the plaintiff may have been the owner, on grounds quite independent of his title to the land. For all that I can see in the count, it may have been either way ; and as the plea correctly follows the language of the count in this respect, it stands quite uncertain. The count does not say of the corn, that it was the same corn cut on the land ; it is not called the *said corn*, nor is there anything but the mere juxta-position of the words, and the probability that it was the same, to warrant us in assuming that it was. The hay is subject to the same remark, with this consideration in addition, that it is *grass*, and not hay, which the defendant is charged with having cut, and that the article "*hay*" is not before mentioned in connection with the land. I was for some time of opinion that the inference, both as to the hay and corn, that they were hay and corn growing on the land in question, was sufficiently plain in the statement to warrant us in assuming that no other hay or corn could be intended than that which the defendant was charged with cutting. But it is necessary, I think, to consider that the plaintiff might undoubtedly have had hay and corn which did not grow on this land, and which the defendant therefore could not claim merely on the ground that he was owner of the soil ; if he had such hay and corn, and if the defendant, when he broke the close, had taken it and carried it away, it is clear that the



plaintiff might have claimed damages for such a trespass in this action, and that he might either have declared for that injury in a separate count; or have included it, as is done here, in the same count with the trespass to the close. In the latter case he could have used no form of words more proper for describing such independent trespass than are contained in this count—viz., “that the defendant then and there seized, took, and carried away the hay and corn—to wit, twenty cart loads of hay, and twenty cart loads of corn—of the said plaintiff, of the value of fifty pounds, off and from the said close, and converted and disposed thereof to his own use.” If this be so, it is plain that as *liberum tenementum* could be no defence to such an injury, it can be no answer to the taking the hay and corn charged in the 3rd count; and, as the demurrer is special, the plaintiff may well insist upon such precision and certainty in the plea as will leave no doubt on this point. The judgment, I think, should be for the plaintiff on the demurrer.

SHERWOOD, J., of the same opinion.

MACAULAY, J.—It appears to me, that in the 3rd count of the declaration three distinct acts of trespass are alleged; all of which the defendant professes to answer in his plea of justification.—

1st. A trespass to the close named on divers days and times.

2nd. Then and there treading down and spoiling grass and corn of the plaintiff then and there growing, and being of the alleged value of 50*l.*, and with cattle eating up and depasturing the grass and corn of the plaintiff, of the alleged value of 50*l.*, then growing and being in the said close; and with other cattle, and with carts, and waggons, and other carriages, crushing, damaging, and spoiling other the grass and corn of the plaintiff, of the alleged value of 50*l.*, then and there also growing, and being &c.

3rd. Also, *then* and *there* mowing and cutting down the grass and corn of the plaintiff then growing in the said close, and then and there seizing, taking, and carrying



away the hay and corn of the plaintiff, of the alleged quantity of twenty cart loads, and value of 50*l*.

To all these trespasses the defendant pleads the common bar of *liberum tenementum*, and so justifies. In the introductory part of the plea the close is referred to as the said close in which, &c. ; and the grass and corn growing thereon, and seemingly above mentioned, are called the grass and corn of the plaintiff. These last mentioned are said to be *the* grass and corn growing on the premises, and *the* hay and corn seized and carried off the close, not calling them *the plaintiff's*.

I am of opinion—1st, that the plea sufficiently answers the trespass to the close, and would meet the whole count, if all that followed were matter of aggravation ; but it is separable and entitled to be regarded as alleging independent distinct acts of trespass to the grass, hay, and corn of the plaintiff, for which he might recover damages on that count, though he failed to rebut the plea of *lib. ten.* as to the close itself. 2nd : I am of opinion that the plea is insufficient in law to cover the trespass secondly enumerated and sought to be justified. The grass and corn are admitted in the plea to belong to the plaintiff, and consequently the common bar is no sufficient answer to the trespasses so admitted and attempted to be justified. The defendant does not plead soil and freehold in the grass, &c., if that would do. It is consistent with soil and freehold in the defendant, as to the close in which, &c., that the grass and corn belonged to the plaintiff ; and the right of soil and freehold is no authority to the defendant to destroy the plaintiff's grass and corn there growing. The defendant should have avoided the admission that they belonged to the plaintiff, and adverted thereto merely as the grass and corn growing on the premises,—when the plea would have been good, upon the ground that the right of property in the soil would *prima facie* import an equal right to the grass and corn thereon growing. But in such a case it is manifest that the defendant would assert expressly that the soil and freehold were his ; and impliedly, that the grass and corn were his also, as growing thereon,—



equivalent to a denial of property in the plaintiff in either. The defendant would justify, not breaking the close or destroying the grass and corn of the plaintiff, but the entry into his own close, and the destruction of his own grass and corn. It seems to me this part of the plea is repugnant, and *felo de se*. 3rd: I think that, taking the declaration and plea together, the whole claim thirdly mentioned would, from the word *also*, be understood to form a joint allegation, and to relate to the same subject matter—namely, that the grass and corn growing, and the hay and corn seized, are the same; the latter being the produce of the farm after they were severed. The averment is separated from the previous part of the declaration by the word “also,” but is not so divided in itself; and quantity and value are not attached to the grass and corn growing and cut down independently of the hay and corn seized and taken away, but follow the latter as apparently applicable to the whole—a construction supported by previous portions of the 3rd count. In this plea the defendant speaks of mowing and cutting *the* grass and corn growing on the premises, and of seizing *the* hay and corn, &c.; contemplating and meaning thereby, as I infer, certain grass and corn while growing, and the same hay and corn after being mowed and cut. In this construction the plea would so far be sufficient, because the right of property would be presumed to be in the defendant, as owner of the soil and freehold; and the grass, hay and corn are not admitted to be the plaintiff's. If, however, the hay and corn seized, &c., should be regarded as distinct from the grass and corn growing and cut, &c., then doubtless the plea would be insufficient, as being no answer to the charge of seizing the plaintiff's hay and corn. My impression is, that the defendant ought either to have taken issue, or new assignment, as the facts of the case might require; but being bad in part, the plea is bad in toto—consequently the judgment ought to be for the plaintiff.

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## JEFFREY V. LAWRENCE.

In an action for breach of promise of marriage, though the jury give only one shilling damages, plaintiff is entitled to full costs.

This was an action for breach of promise of marriage. The plaintiff had been seduced and had a child, of which she declared the defendant to be the father. The evidence was extremely slight to support the alleged promise of marriage; but, as there was some evidence, the Chief Justice, who tried the cause, felt it necessary to submit it to the jury, and declined to nonsuit the plaintiff. He charged, however, strongly in favor of the defendant, considering the evidence of a promise too slight and unsatisfactory to rely upon. The jury found a verdict for the plaintiff, and one shilling damages.

*Washburn* moved for a certificate, under the 43rd Eliz., to deprive defendant of costs.

The court agreed with the Chief Justice in thinking that a certificate ought not to be given. It was for the jury to weigh the evidence. If it satisfied them that the plaintiff had a right of action, (there being no legal objection to its sufficiency,) it seemed difficult to account for such small damages being given. The injury was not trifling, nor the action frivolous; and, admitting the right to recover, it could not be said that the plaintiff ought not to have sued in this court, although the jury had, for reasons not known to the court, awarded very small damages.

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THE KING V. PATRICK KENREY.

A person who has been convicted of a capital felony at a court of oyer and terminer, may be brought up into this court to receive sentence.

The defendant in this case was convicted of arson at the assizes at Cornwall in 1836, and upon some doubt respecting the legal sufficiency of the evidence, Sherwood, J., before whom he was tried, delayed passing sentence until the case should be submitted to the judges. Before the succeeding assizes in 1836, the judges, on consideration of the case, were clearly of opinion that the conviction was proper, and the prisoner, who remained committed in



the gaol of the eastern district, would have received sentence at the assizes but for the circumstance that the crown officer had omitted to take down the indictment on which the prisoner had been tried, and there was no record of the conviction before the court.

To relieve the prisoner from a protracted imprisonment, the court, at the instance of the Attorney General, had him brought up by *habeas corpus* on the first day of this term; and the indictment being removed by *certiorari*, the court, after calling upon the prisoner to say whether he had anything to allege in arrest of judgment, directed sentence of death to be recorded against him.

The prisoner's sentence was soon after commuted to banishment for seven years, upon his petition to the Lieut. Governor.

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#### MCLEOD V. JACKSON.

The omission of an averment of a special request, where required, is matter of form only, and cannot be objected to on general demurrer.

Covenant upon a deed, by which the plaintiff mortgaged to the defendant certain real estate, to secure a debt due of 437*l.*, and the repayment of a loan in addition, which the defendant stipulated by the same deed to make to the plaintiff, to such amount as to increase the debt in the whole to 700*l.* The deed contained no express covenant binding the defendant, in the usual words of a covenant, to advance the additional sum or sums of money; but the mortgage was prefaced by a recital, that "the party of the second part (the defendant) is willing, and has agreed to advance to the party of the first part, any such sum or sums of money, so as the whole do not nor shall amount to more than the full sum of 700*l.*, of lawful money." Upon this clause the plaintiff brought this action, charging in the declaration that the defendant covenanted to advance such further sum or sums as would make up in the whole 700*l.*; and assigning for a breach, that the defendant did not, nor would, although often requested so to do, advance and pay to the plaintiff such sum or sums of money, in addition to the



debt of 437*l.* as would amount in the whole to 700*l.* The defendant demurred generally to the declaration, and the objection raised was the non-allegation of a special request in the declaration.

ROBINSON, C. J.—The court are of opinion that the objection is not fatal on general demurrer. There is no doubt that no right of action in this case could accrue till after the plaintiff had requested the advance of a part or the whole of the money. The obvious effect of the agreement was to bind the defendant to advance to the plaintiff, at such times as he required it, and in such sums as he required it, not exceeding the whole sum limited. There was no precedent debt or duty. The money, when advanced, was to be *lent*; and, in the nature of the case, there could be no obligation till the request was made. If the plaintiff requested a part of the sum to be advanced, and the defendant refused, there would be a breach of the covenant as to such part: if he required the whole to be advanced, and the defendant refused, then he failed in the whole: and this request might be either to pay all in one sum, and at one time, or the plaintiff might have requested at several times several sums, amounting in all to the sum limited. A notice that he wanted the money—or, in other words, a *request*—was clearly necessary, to entitle the plaintiff to an action. Under such circumstances, a specified request ought to have been averred in the declaration; and, undoubtedly, if the defendant had demurred specially for the want of the averment, he must have succeeded. And the case of *Back v. Owen*, 5 T. R. 409, and the earlier authorities collected in a note in the case of *Birks v. Trippet*, 1 Saund. 33, would compel us to hold that the request in such a case is matter of substance, and that the "*licet sapius requisitus*" could be of no avail, and could not help even on general demurrer. Indeed, the case before us is, in my opinion, one that should more strongly lead to such a decision than the case of *Back v. Owen*. But the case of *Bowdell v. Parsons*, 10 E. R. 359, not only overrules those cases in express terms, but lays down the principles so extensively and plainly, that the court cannot deny its



application to this case. Since the stat. 4 Anne, ch. 16, the court are bound to give judgment (where any demurrer shall be joined) according as the very right of the cause and matter in law shall appear unto them, "without regarding any imperfection, omission, or defect in any writ, declaration, or other pleading." Now, we are bound to say here, consistently with what was held by the court in *Bowdell v. Parsons*, that the defendant, being often requested to advance such sum or sums of money as would make up the sum of 700*l.*, was bound to do so—that he was *so requested* is alleged; the objection, therefore, goes only to the want of stating time and place; but these are regarded as matter of form, since neither is traversible. The general venue in the declaration applies itself to all facts averred; and the plaintiff is not held to any conformity, as to time or place, in the evidence given at the trial. In truth, therefore, the time and place of the request are not matters of substance, and the request itself is alleged.

SHERWOOD, J., of same opinion.

MACAULAY, J.—It appears to me that the recital of the mortgage set out on oyer contains a covenant on the defendant's part to advance to the plaintiff on request such sum or sums of money as, in addition to 437*l.*, should amount to 700*l.*; and that in the first count in the declaration it is alleged as a breach of such covenant, that, *although often requested* so to do, the defendant did not, nor would, advance to the plaintiff such sum or sums of money, or any part thereof, but wholly refused and neglected so to do.—5 T. R. 409; 10 Ea. 359; 14 Ea. 300; 2 D. & R. 55. I am of opinion that this shews a substantial breach, and that the omission to add time and place to the averment of a request is matter of form and not of substance, and, consequently, objectionable only on special demurrer. Wherefore judgment should be for the plaintiff.

*Per Cur.*—Judgment for the plaintiff.

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## SCOTT ET AL. V. HEFFERNAN.

A true copy of non bailable process must be served on the defendant in a cause.

*Taylor* moved to set aside service of non bailable process for irregularity. The objection was, that the copy of the *capias* bore teste 2nd November, being returnable the first day of this term, instead of being tested 2nd July, as was the original—that being the last day of Trinity term.

The court made the rule absolute, as it appeared that a true copy of the process had not been served.

## WILSON V. STEVENS.

In an action by A. against C., B. is a competent witness to prove that he was copartner with A. in the transaction out of which the action arose, and that C. had paid him.

The plaintiff in this case sued in assumpsit for goods sold and delivered to the defendant. The evidence shewed that the plaintiff had been in partnership with one Perry: that the defendant was to get out lumber for Wilson and Perry, and was to receive advances on goods from this plaintiff's shop, on the condition that if he did not deliver the lumber to Wilson and Perry, he was to pay for the goods. It seemed rather doubtful, even on the plaintiff's evidence, whether Wilson and Perry were not partners in the shop, as well as in the purchase of the lumber; and the defendant, in order to shew that they were, called Perry as a witness, who declared that he *was* partner with the plaintiff in the shop from which the goods were furnished: that the whole transaction was a partnership transaction, between himself and Wilson on the one side, and Stevens on the other, and that the defendant had paid him in full for the goods. At the trial, *coram* Sherwood, J., it was objected that Perry was not a competent witness; but the judge ruled that he was competent for the purpose for which he was called, as the effect of his testimony was to charge himself, and could in no manner benefit himself, either individually or as a partner. The jury found for the defendant.—Peake, N. P. C. 21; 1 Esp. N. P. C. 20; 4 M. & S. 475.

The court concurred in this opinion, and discharged a rule *nisi*, which had been granted, to set aside the verdict.



## WATSON V. RIORDEN AND OTHERS.

In trespass against several, if the plaintiff prove a cause of action against all upon one count, and attempts, but fails in proving, a second trespass on another count, proving it against some of the defendants only, he is nevertheless entitled to recover for the trespass first proved.

The plaintiff brought trespass against five defendants. The declaration contained several counts. At the trial at the last assizes for the district of Newcastle, before Sherwood, J., the plaintiff first proved a trespass against all the defendants. He then attempted to prove a subsequent distinct trespass, which would have been covered by another count, but he failed to establish a case against more than one or two of the defendants; wherefore he abandoned that count, and reverted to the trespass first proved. The defendants objected that he could not do this: that he must be deemed to have abandoned the first trespass, and must confine himself to the last; and their counsel claimed to have such of the defendants as were not implicated in the trespass last proved acquitted, in order to call them as witnesses in relation to the latter trespass. This was refused, and the jury found for the plaintiff against all the defendants, and 21*l.* damages for the trespass first proved.

*Smith* obtained a rule *nisi* to set aside the verdict.

*Whitehead* shewed cause.

*Per Curiam*.—If there had been but one count, on which the verdict could be rendered, the objection would have rested on different ground; but as this case was, they considered that the plaintiff had clearly a right to recover against all the defendants upon the first count for that trespass which he had proved against all; and when he found that he could not establish a case against the same defendants in respect to the second trespass, there could be no reason why he might not abandon that, and recover a verdict for the trespass first proved. Such a course produced no confusion in respect to damages.—3 Esp. Ca. 202; 3 Stark Ev. 1442, 1463. It was evident he could not upon the evidence have a general verdict, giving damages for both the trespasses, but there was no ground for confining the plaintiff to the latter trespass; and his failing to



prove all he attempted, was no reason against his recovering for what he *did* prove,—the cause of action being distinct upon the record in separate counts.

*Per Cur.*—Rule discharged.

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### DOE EX DEM. M'NAB ET AL. V. SIEKER.

Tenants in common cannot make a joint demise in an ejectment.

In this ejectment, tried at the last assizes for the Midland District, *coram* Macaulay, J., a verdict was rendered for the plaintiff, with leave reserved to defendant to move to enter a nonsuit, upon an objection taken at the trial that the lessors of the plaintiff being tenants in common, the declaration improperly stated a joint demise, whereas it had been repeatedly ruled that tenants in common cannot join in a demise.

*Per Cur.*—The plaintiff must be nonsuited upon this objection. Notwithstanding what was suggested by Gibbs, attorney general, as *amicus curiæ*, in the case of Doe ex dem. Marsack et al. v. Read, 12 Ea. 61, it has been always clearly held that tenants in common cannot join in a demise; and there is good reason for it, as they may hold under titles altogether distinct. In a late case in England, reported in 1 Ad. & El. 750, this point was expressly adjudged.

*Per Cur.*—Rule for nonsuit absolute.

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### DOE EX DEM. ROSS V. BALL.

Where a defendant has entered into a wrong consent rule, and at the trial refuses to confess lease, &c., in consequence of which judgment is entered against the casual ejector, the court will relieve the defendant, on payment of costs.

This ejectment was tried at the last Niagara assizes, *coram* Sherwood, J. The defendant had inconsiderately entered into a consent rule, in the ordinary form, by which he admitted himself to be in possession of a lot of land named (being part of a gore lying between two concessions of the township of Grimsby); whereas the defence he intended to insist upon was, that the premises in question



were not part of that gore in Grimsby, but formed part of one of the concessions between which this gore was said to lie; and that, in fact, there was no space or gore *between* these two concessions. The defendant claimed under an early patent, by the description of which he maintained that there was no gore, but that the two concessions abutted one upon the other. After confessing lease, entry and ouster, and possession, the defendant's counsel discovered that the consent rule precluded him from setting up his intended defence; and he then desired to withdraw his admission of lease, &c., which, after some hesitation, he was allowed to do. A nonsuit was therefore recorded, the learned judge suggesting that the court in *banc.* might probably relieve him, by setting aside the nonsuit, upon terms.

On the first day of term, judgment was entered against the casual ejector in consequence of the nonsuit, and a writ of *hab. fac. poss.* issued.

*McDonell* moved to set aside this nonsuit, judgment, &c., and that a new trial might be granted on payment of costs, in order that he might defend upon an amended consent rule.

*Bidwell* objected to this interposition after judgment had been entered and execution issued.

ROBINSON, C. J.—In the case of *Doe ex dem. Lasher v. Edgar*, and *Doe ex dem. Thomas v. Huff*, this court has granted the relief prayed for here, when it appeared that the defendant had inadvertently omitted to qualify the consent rule. I apprehend the more correct course in such case would be for the defendant not to decline confessing lease, &c., in the terms of the consent rule which he has signed, but rather to allow a verdict to pass against him, and apply to this court afterwards for a new trial on payment of costs. He could do so, I think, with a better grace under such circumstances, than when he has acted in violation of his consent, and the inconvenience would be avoided of having a judgment to set aside. By the practice of the King's Bench, the plaintiff, after a nonsuit granted for failure to confess &c., may enter up judgment on the first day of the term. There is nothing irregular, therefore,



in the plaintiff's proceeding, and we can only relieve on the footing of indulgence. This action, it seems, is brought for four parcels of land, and the defendant is only desirous of defending for two of these parcels. If, therefore, the plaintiff consents to receive possession of these parcels only, under the writ, it will be unnecessary to disturb the judgment; otherwise the court will make absolute the rule for setting aside the judgment and writ of possession, and will grant a new trial on payment of costs, with liberty to the defendant to amend his consent. It seems to me the defendant in this case, having confessed lease, &c., at the trial, could not properly be allowed to retract it. It was an admission of facts deliberately made, in the hearing of the jury, and it could not, I think, be withdrawn at pleasure.

SHERWOOD, J., and MACAULAY, J., concurred in relieving defendant.

*Per Cur.*—Rule absolute.

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ASHTON AND WIFE V. KEESAR.

In trespass for mesne profits, brought by husband and wife, alleging a *joint* recovery, it appeared the recovery in ejectment was by the wife alone. *Held*, a fatal variance.

Trespass for mesne profits. The estate belonged to the wife, who, before her marriage with her present husband, had recovered in an action of ejectment. The declaration in this action improperly described the premises as being the close of the *husband and wife*, whereas the proof by the judgment in the ejectment was of a term recovered by the wife alone.

At the trial, *coram* Macaulay, J., this variance was objected to, and the defendant also offered evidence to prove that he had allowed judgment to be entered against the casual ejector by default, on the express understanding with the lessor of the plaintiff, that costs were not to be demanded of him, and that no action should be brought for the mesne profits.

The learned judge overruled the latter objection, on the authority of *Doe ex dem. Hill v. Lee*, 4 Taunt. 459, and



the plaintiff had a verdict, subject to the opinion of the court on the ground first moved.

*Jarvis* obtained a rule *nisi* to set aside the verdict, on the ground of the variance between the declaration and the evidence in respect to the recovery in the ejectment.

*Per Cur.*—Rule absolute.

#### THRASHER V. TULLOCH.

If a witness be objected to as interested, and on *voir dire* denies any interest, other witnesses may be called to prove that he is incompetent.

The plaintiff sued in assumpsit, and proved a demand exceeding 80*l.*, but he only got a verdict for 9*l.*, in consequence of a debt of 72*l.* being allowed to the defendant. The evidence to support the set-off rested mainly on the testimony of a brother of the defendant, to whom the plaintiff objected, as incompetent from interest, having reason to believe that he was a partner of the defendant.

The witness was questioned on his *voir dire*, and denied that he had any interest. His evidence was consequently received, and the plaintiff afterwards offered to prove, by other witnesses, that he was a partner, and therefore incompetent. Macaulay, J., who tried the cause, inclined to think that the plaintiff, having examined the witness as to his interest, could not be allowed to prove *aliunde* that he was incompetent.

*Murney* obtained a rule *nisi* this term for a new trial, on the ground that the plaintiff should have been admitted to prove the witness incompetent.

*Per Cur.*—We all think the plaintiff might have been allowed to shew by other witnesses that the brother of the defendant was a partner, and so incompetent, although he had been examined on that point on his *voir dire*—and grant a new trial without costs.

#### KING V. KEOGH.

A defendant is entitled to his discharge under 5 Will. IV., ch. 3., on satisfying the court that he has been in close custody more than three months for a debt not exceeding 20*l.*, exclusive of costs.

*Gamble* obtained a rule *nisi* for the discharge of the defendant, a prisoner in execution for a debt under 20*l.*,



exclusive of costs. It was shewn that the defendant had been in close custody more than three months; and the affidavit required by the provincial statute 5 Will. IV. ch. 3, was filed.

*King* shewed cause against the rule, and filed affidavit, in order to shew that the defendant had it probably in his power to satisfy the debt. It was denied, on the part of the plaintiff, that the prisoner's discharge could be opposed, on that ground, where the debt (as in the present case) was under 20*l*. He filed an affidavit, however, on the part of the defendant, repelling the statement contained in the plaintiff's affidavit.

*Per Cur.*—It is important that the practice under this statute should be settled and understood, in order that parties may not incur trouble and expense in bringing matters before the court which they cannot entertain. On a careful perusal of this statute, and comparing it with the British statute 48 Geo. III., ch. 123, which our legislature evidently intended closely to conform to, so far as relates to debts not exceeding 20*l*., we are of opinion that in cases of this description, embraced in the third clause of our statute, the defendant is entitled to his discharge upon satisfying the court that he has been in close custody more than three months, and for a debt not exceeding 20*l*., excluding costs, and having filed such an affidavit as the statute requires. Where the plaintiff can shew to the satisfaction of the court that he has been imposed upon by the defendant in the statement which he has made of any matter entitling him to his discharge, he may, for such fraud, be remanded. But we think, having been in gaol for three months, the legislature meant that he should be discharged, upon application, without the court enquiring into his circumstances. The marked difference between the provisions which the statute makes in respect to debts not exceeding 20*l*., and those contained in the 4th & 5th clauses, applying to debts of greater amount, appear to us to require this construction. It seems reasonable to ascribe this intention to the clause in question; and if it were in some degree doubtful, we ought to adopt that construction which is most favorable to



liberty. We make this rule absolute, on the ground that the defendant has shewn what is sufficient to entitle him to his discharge. It is proper, however, we think, not to order the discharge peremptorily, without a rule to shew cause, since the facts, as to the amount of the debt or term of imprisonment, may be incorrectly stated.—7 Taunt. 47, 407.

*Per Cur.*—Rule absolute.

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BURNSIDE V. WILCOX.

In case for a malicious arrest, the determination of the suit is sufficiently averred in the declaration, by stating that “the plaintiff recovered a certain sum for damages and costs, (under the provincial statute 11 Geo. IV., ch 5, allowing a verdict and judgment for a defendant in set-off), and that the defendant was in mercy, &c.” without averring also, that “the defendant took nothing by his writ,” and an averment that the defendant maliciously obtained a judge’s order to arrest the plaintiff, and issued a writ of *capias ad respondendum*, and endorsed it for bail, shews sufficiently that the writ was endorsed under the order.

In this case the plaintiff sued the defendant for nonperformance of an agreement to build a house, and upon the common counts. The defendant pleaded a set-off, and the jury found a verdict in his favor for 235*l*. The defendant was to have received 450*l*. for the house, and was to have completed it by a certain time. The sum of 150*l*. was to be paid in advance; one hundred acres of land upon Yonge street were to be conveyed by plaintiff to defendant, and accepted as equivalent to 200*l*.; and the remainder was to be paid in money, after the house was completed. The defendant having been unsuccessful in making bricks, the plaintiff assented to postpone the period for finishing the house for another season; and, in the meantime, some alterations were made in the plan which occasioned extra labour and expense. The defendant made other bricks on the premises, and was permitted to make a much larger quantity than would be required for the house, upon the understanding that he might sell them for his own benefit. When the walls were partly erected, the plaintiff, becoming impatient of the delay, expelled the defendant from the premises, took everything into his own hands, including a large quantity of brick belonging to the defendant, and sold



the house and lot, with the bricks and other material, to a third person. Not long after, he commenced this action by arresting the defendant for a large sum of money, which he claimed to be due to him for advances made to the defendant beyond the value of his work and materials. The defendant resisted the action, and contended on the other hand, that a considerable balance was due to him. The cause came first to trial at the assizes for the Home district in October 1835. The estimates made by several witnesses of the value of the labour and materials, furnished by the defendant, varied greatly, the lowest being somewhere about 130*l.*, and the highest about 305*l.* It was not denied that the plaintiff had advanced 150*l.* according to the agreement, and had paid a further sum of 25*l.*, but the case turned principally upon a written memorandum or receipt, which the plaintiff gave in evidence as signed by the defendant, and as containing an acknowledgment that he had been paid 200*l.* in money, as the value of 100 acres intended to be given to him, but which he had agreed to relinquish.

The defendant protested against this charge, as altogether fraudulent. He admitted having signed, at the plaintiff's request, a paper written by the plaintiff, dated 11th September 1833, for the sole purpose, as he alleged, of renouncing any claim to the land, as he had consented to let the plaintiff dispose of it, and to accept satisfaction for the amount (200*l.*) in another manner—namely, by taking a town lot belonging to the plaintiff, valued at 150*l.*, and 50*l.* in money; and he asserted that he was not aware that he had given any receipt for the *payment* of the 200*l.*, and that he had in fact received nothing on account of it, the plaintiff being still in possession of the town lot, which he had never conveyed to the defendant, and for which he had not indeed obtained a title himself; and to shew that he had not received the 50*l.* in money, he produced a note signed by himself, and endorsed by the plaintiff, for 50*l.*, dated 11th September 1833, the date of the receipt, and which had proved unproductive to him, from the bank having declined to discount it. Much evidence was given



on both sides at the trial, and the jury came to the conclusion that the 200*l.* had never been paid; and upon the estimate which they adopted for the value of the defendant's work and materials, they found a verdict in the defendant's favor for 54*l.*, as permitted by our statute 11 Geo. IV., ch. 5. The memorandum in question was not in the ordinary form of a receipt, but began with stating that the plaintiff was at liberty to dispose of the 100 acres of land, to which the defendant had given up all claim, adding that he had received instead thereof the sum of 200*l.* in cash, or words to that effect.

The court, upon the evidence given at the trial, and having the affidavits of both parties before them, respecting this disputed item of 200*l.*, which affidavits were directly repugnant to each other, granted the plaintiff a new trial, on payment of costs; and at the last assizes at Toronto the case was again tried, additional evidence being given on both sides, and the jury found a verdict again for the defendant, with 235*l.* damages.

*Draper* in this term obtained a rule *nisi* for a new trial upon the evidence, and upon the ground that the damages were excessive.

*Bell* shewed cause.

*Per Curiam*.—We do not see that we can properly disturb this verdict. The damages are undoubtedly high, exceeding perhaps by 60*l.* or 70*l.* the highest estimate for which grounds are afforded by the evidence. As the action is on contract, if this were the first verdict given in the case, and there was nothing extraordinary in the circumstances, we should most probably afford relief, on the ground of excessive damages, by allowing a new trial on payment of costs. But this is after a second trial, and under remarkable circumstances. The first verdict was by no means high, considering that the jury rejected the plaintiff's charge of an alleged payment of 200*l.*, but we relieved against it, because the question respecting that receipt deeply affected character; and although the decision of the jury was well warranted by the evidence given upon that occasion, we thought it just to consider that if the plaintiff had really



right upon his side it was possible he might have been taken by surprise by the defence set up against the receipt advanced by him, and, relying upon the writing, he might have come unprepared to support his case by other evidence of the payment. Upon this ground, and that there might be a full and satisfactory investigation of a matter upon which the parties were so directly at issue, we set aside the first verdict, though not without some hesitation, for it was strongly supported by evidence. If the plaintiff really attempted to take so very unjust an advantage of the defendant as to charge him, upon the terms of the receipt, with a sum of 200*l.*, when no part had in fact been paid to him, it was bearing rather hardly perhaps on the defendant to allow him another chance of being successful, after a jury, upon a full trial and upon sufficient evidence, had rejected the charge. And now that the matter has been again tried, and another jury, after a very patient investigation, have come to the same conclusion in respect to this payment, we should not be justified in giving the plaintiff a third trial, unless the ground alleged (excessive damages) existed in such a degree that we could say they were altogether outrageous and beyond bounds. Upon the first trial the jury adopted the lowest estimate furnished : the evidence given by the defendant would have warranted a much larger verdict in his favor ; nevertheless he must have abided by that verdict ; but the plaintiff was not content to acquiesce in it ; and, on his earnest application, the court granted him a new trial. He must be content to take the benefit with the risk that attended it, to a reasonable extent at least. Now the jury have adopted the highest estimate furnished by the defendant's witnesses, and have even gone somewhat beyond it ; and it appears to us that, under the circumstances of this case, the plaintiff must abide by that consequence. This jury being convinced, as the former jury were, that the plaintiff has been acting oppressively in this matter, and has attempted by an artful contrivance to wrong the defendant out of 200*l.*, have probably thought it not unreasonable to add interest to the balance which they may have found due to the defendant, for the three years that



it has remained unpaid, and have considered it just, perhaps, to recompense the latter by taking the most liberal view of his claim. We must now assume, after these concurring verdicts, supported as they are by evidence, that the plaintiff's conduct does stand in this unfavorable light; and if so, he certainly ought not to receive any unusual extension of indulgence from this court in order to relieve him from the consequence of his own act. It would have been better for him that he had abided by the first verdict. We could not at any rate relieve against this, except on the terms of his paying costs; and it is doubtful whether he could derive any advantage from such an interposition if we thought it right to grant the application.

*Per Cur.*—Rule discharged.

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#### BETHUNE V. BROWN.

A. being in execution at the suit of B., recovered judgment against B. for a sum smaller than that for which he was charged in execution. *Held*: That the proceedings in this cause might be stayed on satisfaction being entered on B.'s judgment for the sum recovered by A. against him.

The plaintiff in this action of trespass and false imprisonment had recovered 200*l.* damages at the last assizes for the district of Newcastle. The defendant had before that recovered judgment against the plaintiff upon confession for a large sum, and held him in execution on a *ca. sa.* issued on that judgment.

*Smith* moved to enter satisfaction upon the judgment obtained against Bethune for the amount of damages recovered in this action against Brown, and that satisfaction being acknowledged, all further proceedings on the verdict in this case should be stayed.

*Sherwood* shewed cause, insisting that Brown having taken Bethune in execution, his debt was so far satisfied: that the set-off proposed could not properly be allowed; and he cited *Taylor v. Waters*, 5 M. & S. 103.

*Per Cur.*—That case establishes only that a debt upon which the debtor is detained in execution cannot be pleaded as a set-off in another action; but the court, in



giving judgment, admit that, under circumstances like the present, where satisfaction may be entered, proceedings on the second action may be stayed; and the cases of Vaughan v. Davies, Peacock & Jeffery and Simpson v. Hanley, 2 H. Bl. 440; 1 Taunt. 426; 1 M. & S. 496, are precisely in point.

Rule absolute.

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McLACHLAN V. WISEMAN.

The ordinary conclusion to an affidavit to hold to bail, "that he does not sue out &c. from any vexatious or malicious motive," is not necessary in an affidavit to obtain a judge's order to hold to bail.

*Taylor* obtained a rule *nisi* to set aside the arrest in this cause, for defect in the affidavit to hold to bail. The objection was, that instead of concluding his affidavit by a declaration that he did not "sue out the process from any vexatious or malicious motive," as the statute directs, the plaintiff declared that he did not *make the affidavit* from any vexatious or malicious motives.

On the return of the rule the court discharged it, saying, it appeared that the arrest was upon a judge's order, and the affidavit was sufficient for the purpose, this not being the case of a debt certain, to which alone the statute extends. The plaintiff in this case was not bound to any precise form of affidavit.

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GOODTITLE EX DEM. SNYDER V. BARKER.

If a party relies on a patent from the crown to make out his title, he should, in the event of its being mutilated or injured, so as to render it impossible to ascertain its contents satisfactorily, obtain an exemplification.

In this case the lessor of the plaintiff endeavoured to make title under one Crane as grantee of the crown, but he neither produced a patent nor an exemplification of a patent, but a mutilated piece of parchment, or paper, with a seal accompanying, but not attached to it; having the appearance of being a fragment of a patent, but not having the name or style of the king upon it, nor the signature of a lieut. governor, both those parts being wanting on which



the signature usually appears. The name of the grantee was not distinctly legible. For want of proof of the grant, Sherwood, J., nonsuited the plaintiff.

*Hitchings* obtained a rule *nisi* to set aside the nonsuit, against which *Fairfield* shewed cause.

*Per Cur.*—The party having nothing but this extremely mutilated fragment of what may, or may not, have been a patent, ought to have procured an exemplification. It would be altogether unsafe to receive this scrap of paper in evidence; and, as the law provides for the obtaining much more satisfactory evidence of the patent intended to be proved, the party should have resorted to that.

Rule discharged.

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#### CAMPBELL V. BRUCE ET AL.

In an action against several, if the plaintiff's proceedings be irregular as to *some*, and he proceed to trial with notice of the irregularity, and obtain a verdict, he cannot sustain it by entering a *nolle prosequi* after trial, as to those defendants against whom his proceedings were irregular.

The plaintiff sued five defendants in trespass *qu. claus. freg.*, with a count for taking goods. Each defendant pleaded separately the general issue, and a special justification. The plaintiff filed to all the special pleas the general replication *de injuria*. Helmer, one of the defendants, had justified as a constable, under the warrant, and conceiving that the replication *de injuria* was not a proper answer to his plea, demurred to it specially, filing his demurrer in due time. The plaintiff, notwithstanding this demurrer, added the similiter to all his replications, and made up his record, and went to trial, taking no notice of the demurrer. The defendant gave notice before the assizes that he would move to set aside the verdict for irregularity. And now in this term the demurrer was set down for argument, and the defendant moved to set aside the verdict, on account of the irregularity in making up the record, as if all the defendants had joined issue on the facts.

The plaintiff's counsel afterwards, in this term, stated his intention to enter a *nolle prosequi* as against the defendant Helmer, to which the defendant's counsel objected;



but the court determined that he could do so of right in this stage of the cause; and that it would consequently become unnecessary to consider the demurrer. They determined, also, that the proceedings to trial must notwithstanding be treated as irregular, though the irregularity would have been avoided by the entry of a *nolle prosequi* before trial.

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### LANE V. McDONELL.

The court will set aside an interlocutory judgment after the lapse of a year, in case the defendant not having appeared the plaintiff has neglected to file common bail for him.

*Bidwell* moved to set aside the interlocutory judgment and assessment of damages in this cause for irregularity. The plaintiff had signed judgment without entering appearance for the defendant according to the statute, although the defendant had not appeared; and after the delay of more than a year he proceeded to assess damages upon the ordinary notice, not giving a term's notice.

Cause being shewn,

*Per Cur.*—The judgment must be set aside as well as the assessment. Our statute directs that if the defendant has not appeared the plaintiff is to enter appearance for him, and then can sign judgment if he does not plead in due course. He omitted to enter appearance; the defendant consequently was not in court when judgment was signed against him, and therefore the judgment was a nullity. They referred to two cases in Dowling's Reports of Cases of Practice, 1 Dow. 28, and 3 Dow. 550.

Rule absolute.

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### DOE EX DEM. MORGAN V. SIMPSON.

Seizin in fee cannot be presumed from a mere constructive possession, but from an actual visible possession only.

In this action of ejectment, tried at Hallowell at the last assizes, the lessor of the plaintiff made title under a conveyance from one Mary Sheriff of the south half of lot 13 in the 2nd concession of the military tract; but the title of Mary



Sheriff was not shewn; neither was it shewn that she was in actual possession of the premises at the time of making the conveyance. On the contrary, another person was then resident, and had been so for many years, upon the particular parcel of land sought to be recovered in this ejectment, claiming it as part of the adjoining lot No. 12. Between the possession of this person and Mary Sheriff a highway intervened, which had been long in use: but, on the part of the lessor of the plaintiff, it was contended that this highway was not on the proper line, and that the true boundaries of lot No. 12 not only extended beyond it, but embraced that piece of land on the other side of it of which the proprietor of 12 was in possession, and which formed the subject of contention in this action. Under these circumstances it was argued that Mary Sheriff being in actual possession of lot No. 13, or at least the greater part of it, her possession equally extended to the piece of land in dispute, if it could be shewn that that was part of No. 13, since it was not necessary to constitute possession that a person should really occupy every portion of a lot. Sherwood, J., who tried the cause, was of opinion at the trial that the title of Mary Sheriff not being shewn, it was necessary to prove that she was in actual possession before her right to convey could be presumed, and for want of such proof the plaintiff was nonsuited.

*McDonell*, in this term, moved to set aside the nonsuit; but, on cause being shewn, the court discharged this rule, saying that the possession from which seizin may be inferred must be an actual visible possession, not by construction merely. Here, so far from there being ground for the inference that Mary Sheriff was seized of the piece of land in question, there was every apparent reason for presuming the contrary, for she was actually dispossessed, and the land was in the occupation of another.

*Per Cur.*—Rule discharged.

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## SKINNER V. MAIR.

In slander, the general issue only being pleaded, the jury found for the plaintiff 1s. damages, "and full costs of suit."  
*Held*, that the plaintiff had a right to tax his full costs.

This was an action for slander, in which the general issue only was pleaded. At the trial, *coram* Macaulay, J., the jury found a verdict for the plaintiff, with one shilling damages, "and full costs of suit."

*Draper* moved the court this term for their direction to the Master to tax full costs

The Court expressed their opinion that the plaintiff was entitled to full costs, according to the resolution of the judges, reported by Salkeld in *Brown v. Gibbons*, 1 Salk. 207, in which it is held, "that in an action upon the case for slander, although the court are bound by 21 Jac. I. ch. 16, and cannot increase the costs, when the damages are under 40l., yet the *jury* are not bound by that statute;" and they directed full costs to be taxed in this case.

## DOE EX DEM. LEMOINE V. RAYMOND.

The signature and seal of a person, affixing the same as chief magistrate, to an affidavit proving the due execution of a commission issued from this court, will be presumed genuine till the contrary is proved.

*Query*: Whether the witnesses should not sign their deposition; and whether it should expressly appear on the face of the answer that they were sworn.

In this case, tried at the last assizes at Kingston *coram* Macaulay, J., the lessor of the plaintiff made title by shewing, first, a patent to Joseph Lemoine, as son and heir of Henry Lemoine, dated May 1802; and next, by offering evidence to shew that he was heir to this Joseph Lemoine, (who died intestate in 1814,) being the eldest son of Major General John Lemoine, the eldest brother and heir of Henry Lemoine, the father of Joseph. Evidence to prove pedigree had been taken in the island of Jersey, under a commission from this court, and the due execution of the commission was proved by an affidavit sworn before "Sir John Deville," who signed as "bailiff or chief magistrate," and affixed his seal to his certificate, authenticating the affidavit. It was objected that his signature and



the seal must be proved to be genuine, and that it should be shewn that the office of bailiff of Jersey did in fact constitute him chief magistrate. It was further objected, that it nowhere appeared to be sworn, or expressly stated, that the witnesses were examined on oath; or that the commissioners, or their clerk, had been sworn to discharge their duty faithfully, &c. There was no jurat to the answers of the witnesses, nor were their answers signed by them. The judge noted these objections at the trial, but allowed the evidence obtained under the commission to go to the jury; and there being also independent evidence of pedigree, from witnesses examined at the trial who had been many years acquainted with the family, the jury found a verdict for the plaintiff under the direction of the court.

*Kirkpatrick* in this term moved for a new trial, renewing his objections to the reception of the evidence under the commission, and contending that on the whole case there was not conclusive evidence of the lessor of the plaintiff being heir to Joseph Lemoine.

*Draper* shewed cause.

*Per Cur.*—We are of opinion this rule should be discharged. The evidence of pedigree given by witnesses examined at the trial was sufficient, standing as it does uncontradicted, to support the plaintiff's case; and it was of that description which the law admits in such cases. It was indeed more full and satisfactory than can always be produced in similar cases, particularly where the family have been resident abroad. No one appears here to dispute the right of succession; it is a contest between the person whose title to the inheritance seems clearly made out and a stranger who sets up no right. With respect to the objections taken to the evidence under the commission, it is not necessary to determine them, since we think the case supported by the other testimony. We see no objection, however, so far as regards the authentication of the commission by the chief magistrate. His signature and seal must be presumed to be genuine until something is shewn to the contrary; and, as Sir John Deville signs as chief magistrate of Jersey, we give credit to his certificate



and assume that he is so. If the practice were otherwise, it would often be difficult and sometimes impossible to make use of these commissions, when returned from foreign parts, since it is not probable that the signature of the mayor or the seal of the corporation of an obscure borough in England or Scotland could be proved in this province. We give credit to it upon inspection, as we do to a notary public's certificate in commercial transactions. With regard to the other objection, of the witnesses not having signed these answers, or its nowhere appearing that they were sworn, it is to be remarked that the affidavit sent with the commission declares that it was "duly executed," and the witnesses in their answers are called "deponents," which seems to imply that they were sworn. We forbear, however, to determine whether these apparent defects are substantial objections to the receiving of the evidence, since it would at any rate not be desirable unnecessarily to pronounce a judgment which might appear to sanction a less formal execution of such commissions than usually obtains at present.

Considering the plaintiff's title to be sufficiently proved, without resorting to the commission, we discharge the rule *nisi* for a new trial.

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#### GAMBLE ET AL. V. BUSSELL.

The Court will not order that execution shall issue on a judgment for the benefit of a third party, a stranger to that judgment.

The plaintiff in this case recovered in an action against the sheriff of the Home district for a false return to a writ of *fi. fa.* issued in this suit—for the facts of which case see the report, ante 272.

*Draper* now moved the court for leave to take out another writ of *fieri facias* in this suit, stating that it was intended to seize and sell under it the same leasehold property which had been sold under the other execution, the sheriff not having perfected execution in that case, but having delayed to make any deed to the purchaser until the dispute about priority should be determined. The application was de-



clared to be made at the instance of the sheriff, and for his indemnity, as the attorney for the plaintiffs declined proceeding further in this cause, being content to look to the sheriff for their debt and costs under the verdict obtained.

*Spragge*, on the part of the purchaser of the leasehold property sold at sheriff's sale, opposed the ordering a writ of execution for the purpose of having the property resold, contending that the purchaser was entitled to a deed; and that the sheriff must seek his indemnity otherwise as he could.

*Per Cur.*—We cannot properly interpose in this case and direct proceedings to be had in it against the will of the plaintiffs, and for the sake of a third party. The sheriff must obtain the permission of the plaintiffs in this cause to sue out execution in their name; it is probable they will have no objection if he offers them indemnity against any consequences that may arise from it. We cannot say that the plaintiffs *shall* take out another execution if they desire not to do so. Whether the sheriff could or could not sell the lease again under a second execution is a point upon which he must take advice. We will give no sanction or direction beforehand. His conduct hitherto has been reasonable and natural. The point of priority between the first attachment and the first execution was one on which he might well entertain doubts; and we presume that he did that which he thought his duty in selling on the first execution. When he found that the propriety of that act was called in question, it was but prudent that he should refrain from executing the deed until that question was determined. He has, therefore, every claim to fair consideration, but we cannot interpose in his behalf in the manner desired. He must make his arrangements with these plaintiffs.

MACAULAY, J., gave no opinion.

*Per Cur.*—Rule refused.

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## THE ATTORNEY GENERAL V. DOCKSTADER.

In an information for an intrusion the venue may be laid in any district.

This was an information, filed by the Attorney General, for an intrusion into the lands of the crown, situate in the Midland district. At the trial, before Robinson, C. J., at the last assizes at Toronto, it was objected that the cause could not be tried, except by a jury of the district in which the lands are situated. The Chief Justice considered there was nothing in the objection, and directed a verdict against the defendant, leaving the objection to be renewed in term, if the defendant's counsel found he could support it.

*Armstrong* in this term moved to set aside the verdict, on the ground that the trial was illegally had in the Home district,—the cause of action being in its nature local; and contending that the exception in the case of the king did not extend to actions or informations of this nature.

The *Attorney General* shewed cause.

*Per Cur.*—We consider the principle well settled; and that the king, in an information of intrusion, may lay his venue in any county, without regard to the local situation of the premises,—Mason Jr. Exch. Pr. 197; and in this information the venue was laid in the Home district, under a *scilicet*, so that there could be no repugnance in the record with respect to the award of the venire.

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DOUGLAS V. HUTCHINSON.

The court set aside a writ of certiorari, which issued to remove proceedings from a district court after judgment and execution, and without any application to this court or a judge, laying any special ground.

*Boswell* obtained a rule *nisi* to set aside a writ of *certiorari*, which had issued to remove this cause from the district court, on the ground that the defendant had sued out the writ after judgment entered and execution issued, and without any application to this court laying special ground.

*Whitehead* shewed cause.

The Court made absolute the rule for setting aside the writ, and remanding the proceedings to the court below.



## DUNN v. McDougall.

Under peculiar circumstances the court will refuse to grant judgment as in case of nonsuit, for not going to trial pursuant to notice.

This was an action for false imprisonment. The record was entered for trial at the last assizes for the Home district, and the plaintiff's attorney not being present when it was called on in its order, nor for some hours after, and the defendant's attorney insisting that the cause should be disposed of, it was struck out of the docket by the Chief Justice. The plaintiff's attorney afterwards applied to have the cause tried, which was resisted on the other side, and the Chief Justice declined allowing it to be restored to the docket, stating that according to strict practice in England the defendant was entitled, under the circumstances of the case, to have the plaintiff nonsuited; and that when a cause was struck out of the docket, he thought it the same as if it had not been entered, and he apprehended he had no authority to direct it to be placed again upon the docket, especially when the defendant strenuously resisted it, alleging, as he did here, that he had sent away his client's witnesses. When the cause is undefended, or no resistance is offered by the defendant, being present, it might be otherwise.

In this term the defendant moved for judgment as in case of a nonsuit, and the plaintiff shewed cause, filing affidavits of the above circumstances.

The Court, upon a consideration of the affidavits on both sides, said they would grant the rule and discharge it on the ordinary undertaking, if the plaintiff chose to enter into it, as they could not properly relieve him except on payment of costs, the defendant being in no fault. If the plaintiff did not assent to this they would grant the costs of the day on defendant's application; but they would not grant judgment as in case of a nonsuit in such a case as this. The court referred to the case of *Falls v. Lewis* (Dra. Rep. 281), decided in this court.

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LINFOOT V. O'NEILL.

When a certificate for costs has been ordered at the trial but not completed from inadvertence, the judge may afterwards complete it.

This case was tried before the Chief Justice, at the last assizes for the Home district. Immediately on the verdict having been rendered a certificate under the 58th Geo. III., ch. 4, was moved for, which the Chief Justice, under the circumstances of the case, granted; and the clerk of assize began to indorse it, and had written several words, when his attention was called to other business, and he omitted afterwards to finish it and to present it for signature.

The plaintiff's counsel moved, this term, for the Chief Justice to sign the certificate, and on affidavit of the plaintiff's attorney and the clerk of assize of the above fact, and after hearing the other party, the Chief Justice signed the certificate *nunc pro tunc*, as it was promptly moved for at the trial and granted, which was not denied on the part of the defendant.

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BREWER V. BACON.

It is not a sufficient service of a notice of trial to leave it at an attorney's office, no person being there.

*Small* moved to set aside a verdict rendered in this cause for irregularity, on affidavit that no notice of trial had been served.

*Draper* shewed cause and produced an affidavit that a notice of trial had been left at the office of the defendant's attorney, but not that it was left with or given to any person there; nor did it appear that the defendant's attorney or any of his clerks had any knowledge of the notice being left at the office.

*Per Cur.*—That is not sufficient service; the notice should have been *delivered* to some person.

Rule absolute.

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## HILARY TERM, 7 WILL. IV.

DOE *EX DEM.* THE TRUSTEES OF THE METHODIST EPISCOPAL CHURCH IN THE TOWNSHIP OF KINGSTON *V.* BELL.

Where real property was given by deed in trust for the Methodist Episcopal Church in Canada, according to the rules adopted by the General Annual Conference, and that when any of the trustees or their successors should cease to be a member of that church, that such trustee should vacate his trusteeship; and at a general conference, the majority did away with Episcopacy, and having appointed new trustees, claimed the property from the old trustees, who adhered to the Episcopacy, on the ground that by not conforming to the rules of the general Conference, they had ceased to be trustees, according to the terms of the trust deed, and the new trustees took possession of the property, *Held*, on ejectment brought by the old trustees, that they were entitled to recover, the Conference having no power to do away with Episcopacy, and the old trustees, by continuing in the original church, having complied with the terms of the deed.

ROBINSON, C. J.—The question which stands for our decision in this case is one interesting in its nature and of much consequence, I apprehend, to numerous congregations of Christians, affecting, in no small degree, their peace and welfare. This action of ejectment is brought at the instance of certain individuals who claim to be the trustees holding the legal estate in a small piece of ground with a meeting house built thereon, which was used for some years as a place of worship by a congregation of Methodists calling themselves members of the Methodist Episcopal Church in Canada.

A dispute has recently arisen respecting the occupation of this property, in consequence of a change brought about in the government and discipline of the Methodist Society in this province, in which change all its members, it appears, do not concur.

The defendant was some time ago placed in charge of the meeting house by certain other individuals, who claim to be the trustees invested with the legal estate in this property, and who deny that the persons joining in the corporate name used in this action have any legal interest in the premises. He holds under the last mentioned trustees, and sets up their title as his defence.

The question arises upon the following facts:—

In 1828 a statute was passed in this province, (9 Geo. IV. ch. 2,) in which it is recited, that religious societies of



various denominations of christians had found difficulty in securing the title of land requisite for the site of a church, meeting-house or chapel, or burying-ground, for want of a corporate capacity to take and hold the same in perpetual succession; and for remedy it is enacted, that whenever any religious congregation, or society of Methodists, &c., (enumerating also in the statute many other denominations of christians,) shall have occasion to take a conveyance of land for any of the uses aforesaid, it shall be lawful for them to appoint trustees, to whom and their successors, to be appointed in such manner as shall be specified in the deed, the land requisite for all or any of the purposes aforesaid may be conveyed; and such trustees, and their successors in perpetual succession, by the name expressed in such deed, shall be capable of taking, holding, and possessing such land, and of maintaining any action for the protection thereof, and of their right thereto. The statute provides that more than five acres of land shall not be held in trust for any one congregation; and that the trustees shall, within twelve months after the execution of the deed, cause it to be registered in the office of the county register. Upon these two latter provisions, however, no question arises in this case.

On the 9th of August 1832, a deed of bargain and sale was executed, which was registered on the 6th of July following; and in which, after setting forth particularly the provisions of the statute, it is recited that a religious congregation or society of Methodists had occasion to take a deed of a tract of land in the township of Kingston, for the site of a church and burying-ground, and had appointed nine persons to be trustees for holding the same, according to the act; and by this deed, one Daniel Ferris, the grantor, for a consideration of 3*l.*, acknowledged to be paid, grants bargains, and sells to the nine persons named as trustees, (viz.), "John Grass, James Powley, Barnabas Wurtman, Gilbert Purdy, Francis Lattimere, and Robert Abenethy, and to their *successors to be appointed in the manner specified in the deed*, all that parcel of land, &c., &c., being one acre of ground, in the township of Kingston, on which a



stone church is standing, with all the estate &c. ; to have and to hold the said tract, &c., to them, the said trustees, and their successors in the said trust for ever, for the site of a church and burying-ground, *for the use of the members of the Methodist Episcopal Church in Canada, according to the rules and discipline which now are, or hereafter may be adopted by the General or Annual Conference of the said church in Canada* ; in trust and confidence that the said trustees for the time being shall at all times hereafter permit any Methodist Episcopal minister, or preacher, or ministers or preachers, (he or they being a member or members of the Methodist Episcopal Church in Canada, and duly authorized as such by the said General or Annual Conference to preach and perform religious service in the said house and burying-ground, according to the rules and discipline of the said church) : and in further trust and confidence that they, the said trustees for the time being, may, at their discretion, by and with the consent and advice of the preacher in charge, permit the regular minister and preacher of any other protestant denomination of christians to preach and perform public religious service in the said house, when it shall not be required for the use of the ministers or preachers of the Methodist Episcopal Church in Canada."

The deed then proceeds thus—" And it is hereby declared to be the true intent of this deed, that the full number of the trustees of the said trust shall continue to be *nine* ; and that whenever any one or more of the said above named trustees, or of their successors in the said trust, shall die or cease to be a member or members of the said Methodist Episcopal Church in Canada, according to the rules and discipline of the said church, the vacant place or places of the trustee or trustees so dying or ceasing to be a member or members of the said church shall be filled with a successor or successors being a member or members of the said church, of the age of twenty one years, to be nominated and appointed as follows—to wit, by the *stationed minister or preacher* in the charge of the said church for the time being, within whose station or circuit the said parcel or tract of land shall be,



and thereupon appointed by the surviving trustee or trustees of the said trust, if they think proper to appoint the person or persons so nominated (in case the votes of trustees shall be equal, the stationed minister to have a casting vote); and if it shall happen at any time that there shall be no surviving trustee of the said trust, then it shall be lawful for the stationed minister or preacher who shall have charge of that station or circuit for the time being to nominate, and the quarterly conference of that circuit or station, if they approve the person or persons so nominated, to appoint a requisite number of trustees of the said trust, by a major vote of the members of the said conference then present; and in case of an equal division of their votes, the chairman of the conference shall have a casting vote in such appointment; and the person or persons so nominated and appointed trustee or trustees, in either of the said modes of nomination and appointment, shall be the legal successor or successors of the said above named trustees; and shall have in perpetual succession the same capacities, powers, rights, and duties, as are given to the said above named trustees in and by the deed and the statute aforesaid."

Much of what I have extracted from the deed does not bear directly upon this question; but in tracing the legal estate the terms of the trust declared in the deed are so material as they affect the succession to the trust—or, in other words, to the estate—that it is but right to give them at length, in order that everything may come under view that can properly influence the decision.

It appears that the Methodists in this province, being at first almost exclusively emigrants from the revolted colonies, or from the United States after their independence, or the descendants from such emigrants, did not for many years attempt to set up a church of their own, and had no connection with any Methodist society in Europe, but they enjoyed the ministrations of their religion under ministers who received their ordination in the United States, and who accounted themselves, and were accounted members, of the Methodist Episcopal Church in America; or, in other words, of the Methodist Episcopal Church in the



United States. They regarded themselves at that time as belonging to that body, being amenable to no other, and having no other means but through them of regulating their church, enforcing discipline, and obtaining preachers.

There being some jealousy probably of a connection, though purely ecclesiastical, with a foreign body, it was proposed in 1828 that they should separate themselves; and the Methodist Society in Canada petitioned *to be allowed to separate*, which was an acknowledgment of their actual relation or connection. The general conference in the United States *allowed* it; and they simply separated in that year without any condition or qualification, and erected themselves into an independent church, contemplating, it would seem, at that time no change in regard to episcopacy, but being under no stipulation in that respect with the church from which they had separated.

In the following year (1829) the general conference in this province published what they called "*The Doctrines and Discipline of the Methodist Episcopal Church in Canada*," addressed to the members of that church, and authenticated by the signatures of the president and secretary. This appears to be a solemn and formal declaration by the governing power in the society—1st, Of the origin of the Methodist Episcopal Church.

2ndly, Of their articles of faith.

3rdly, Of the government and discipline of the church, including an exposition of the constitution and powers of the general and annual conferences—of the election and consecration of bishops—of the election of presiding elders—the election, ordination, and duties of travelling elders and of deacons—the receiving of travelling preachers and their duty, and the duties of those who have charge of circuits—a code of practical instructions and rules for the government and assistance of their preachers—provisions for the trial and expulsion of immoral ministers, and directions concerning their local preachers.

4thly. Directions concerning baptism, the administering the Lord's Supper, and the performance of public worship.

5thly, The nature, design, and rules of their united societies, their class meetings, and band societies.



6thly, Rules and advice for the government of their members, and provisions for excluding from their societies immoral and disorderly persons—(these extend to the lay-members).

7thly, The forms or services of the church to be read in administering the sacrament, in baptism, in solemnizing matrimony, in the burial of the dead, and in ordaining bishops, elders, and deacons.

8thly, The temporal economy of the society, including under this head directions for fixing the boundaries of the annual conference—the *building of churches*, and the order to be observed therein—directions respecting the eligibility of persons to be trustees for their churches, houses, or schools, and respecting the *security of their preaching houses and the premises belonging thereto*, (by which is meant securing the tenure of them in an effectual and convenient manner). For this latter purpose the plan or form of a deed of settlement for vesting their several meeting-houses and burial-grounds in trustees, and providing for a succession of trustees, is\* set down at full length in this book of discipline, with a direction that such form shall be adhered to in all possible cases. This form agrees verbatim with the deed given in evidence in this action, which shews that the deed taken in 1832 was taken in exact conformity to a draft of a deed that had been prescribed by the conference.

9thly, The management of the pecuniary affairs of the society—viz., the raising and appropriating funds for the support of their ministers and preachers, and for other objects.

I have been thus particular in enumerating the contents of this "*Book of Doctrine and Discipline*," though many parts of it may not serve to throw light on this question, in order to shew in the first place, that, from its nature and objects, it is evidently of the highest authority among the members of this religious community, and that no opinion can be safely formed on any question affecting their doctrine, government, discipline, or temporal economy, without minutely examining it throughout. At present, I will



only notice the few passages of this manual of the Methodist Episcopal Church which bear prominently upon the question before us, and which was cited and relied upon by both parties in the argument, though the inferences they would deduce from them are exactly opposite.

In the first section, the origin of the Methodist Episcopal Church is thus set forth—"The preachers and members of our society in general, being convinced that there was a great deficiency of vital religion in the Church of England in America, and being in many places destitute of the christian sacraments, as several of the clergy had forsaken their churches, requested the late Rev. John Wesley to take such measures in his wisdom and prudence as would afford them suitable relief in their distress. In consequence of this, our venerable friend, who under God had been the father of the great revival of religion now extending over the earth, by the means of the Methodists, determined to ordain ministers in America, and for this purpose, in the year 1784, sent over three regularly ordained clergy; *but, preferring the episcopal mode of church government to any other*, he solemnly set apart, by the imposition of his hands and prayer, one of them—viz., Thomas Coke, Doctor of Civil Law (late of Jesus College in the University of Oxford) and a presbyter of the Church of England—for the episcopal office, and having delivered to him letters of episcopal orders, commissioned and directed him to set apart Francis Ashbury, their general assistant of the Methodist Society in America, for the same episcopal office, he (the said Francis Ashbury) being first ordained deacon and elder. In consequence of which, the said Francis Ashbury was solemnly set apart for the said episcopal office by prayer and the imposition of the hands of the said Thomas Coke, other regularly ordained ministers assisting in the sacred ceremony. At which time the *general conference, held at Baltimore*, did unanimously *receive* the said Thomas Coke and Francis Ashbury as their bishops, being fully satisfied of the validity of their episcopal ordination."

This is the account given by the Methodist Church in Canada of the introduction of episcopacy into the Methodist



connexion in America. Then next we learn from this book of discipline, that in the Methodist Episcopal Church in Canada there was a general conference, composed of all the travelling elders who had travelled four years last past and had been received into full connexion. The elders were elected by a majority of the annual conference, and were ordained by the bishop, with the assistance of some elders. They were in full orders of the Methodist church, and could administer baptism and the Lord's supper, perform the office of matrimony, and all parts of divine worship.

Whenever the general conference met (composed, as before stated, of such elders as had travelled four years, and had been received into full communion,) two thirds of its members were necessary to form a quorum for transacting business. One of the general superintendents was to preside; or, if nine were present, then a president for the time was to be chosen by the conference. The first general conference of the Methodist Episcopal Church in Canada was appointed by this book of discipline to be held on the last Wednesday in August 1830, and thenceforward it was to meet once in four years, at such times and in such places as should be fixed on by the general conference from time to time. But the general superintendent, with the advice of the annual conference or conferences, or if there be no general superintendent the annual conference or conferences, respectively, had power to call a general conference, if they should judge it necessary, *at any time*.

The general conference had so far an overruling power in the church, that they could elect the bishop, and could reprove, suspend, or expel him, if they found cause for it; and to the conference he was expressly made amenable for his conduct. Of this conference it is further to be observed that it was in no part composed of lay-members; and that no power over it, or appeal from it, is given by this constitution to any authority in the society, or to the whole society collectively—I mean, there is none expressly given.

The only control provided is by setting down in this book of discipline certain restrictions upon their power.



From whence the authority of the conference arose, indeed, was not shewn at the trial; there was no evidence of compact among the members of the society.

For all that appears in evidence, they assumed, as the supreme governing power of the church, to proclaim, by this publication of their "discipline," to all who chose to unite with them, that these were the terms on which they could partake of the ministration of religion under their dispensation; and the restrictions, so far as I see, were limitations voluntarily set by themselves to their own power, and by which (having thus formally declared them) they would afterwards be bound. This assumption of the conference, without affecting to derive it from any general compact of the body including the lay members, but rather leaving the latter to adhere or to renounce the society, as they might determine, does, as I understand it, comport with the principles of the Wesleyan Methodist system, from its foundation.

We are next to consider what are the powers of this general conference, as we find them declared in the book of discipline. They are thus set forth:

"The general conference shall have full powers to make rules and regulations for our church, under the following limitations and restrictions:"

1st, "They shall not revoke, alter or change our articles of religion, nor establish any new standards or rules of doctrine, contrary to our present existing and established standards of doctrine."

2ndly, "They shall *not change or alter* any part, or rule of our government, so as to do away with episcopacy or destroy the plan of our *itinerant general superintendency*."

Then follow restrictions 3, 4, 5, 6 and 7, which relate to matters not affecting the question before us, and chiefly temporal concerns; and the 7th or last restriction concludes thus—"Provided, nevertheless, that upon the joint recommendation of three-fourths of the annual conference or conferences, then the majority of three-fourths of the general conference shall suffice to alter any of the above restrictions, except the 6th and 7th, which shall not be done away



or altered without the recommendation or consent of two-thirds of the quarterly conferences throughout the connexion." The 6th restriction, above referred to, relates to matters of temporal economy only, such as the building meeting houses, the allowance to ministers, &c.

The seventh restriction relates (among other things) to the *doctrines* of the church, and it provides, "that no *new rule, regulation, or alteration*, respecting the *doctrines* of the church, shall have any force or authority until laid before the quarterly conferences throughout the connexion, and approved of by a majority of the members of two-thirds of the said conferences."

Thus it will be seen, that in 1828 the Methodist Society in this province separated from the Episcopal Methodists in the United States, and formed an independent church of their own: that in 1829 their conference published this "Book of their Doctrines and Discipline," the only account of their constitution we have heard of: and that in August 1830, when the first general conference met, it assembled and acted under the constitution; and the society appears to have rested on this footing till August 1832, there being no bishop of the church during that time, although there was a provision in the constitution for electing and ordaining one. A superintendent, who had not been ordained bishop, performed such functions as the constitution provided for during the absence of the bishop: but there was actually no bishop of the church, and the bishop of the Methodist Episcopal Church had no authority or control over the society in Canada.

In 1832, the idea of uniting themselves to the Wesleyan Methodist Society in England seems first to have been entertained in this religious community—at least, the first manifestation of that intention spoken of at the trial of this cause was in that year. At the annual conference in August 1832, a union with the British Wesleyan Methodists was openly proposed and discussed. Whether the first suggestion of such an union originated in the society here, or whether they were invited to it by the society in England, we are not aware; but it seems that Mr. Alder (a represen-



tative from the British Wesleyan Conference) was then in Canada, and stated to the conference, or to the members of it, that such an union could not take place so long as the society in Canada retained episcopacy as a part of their constitution or church government; because Wesley, the founder of Methodism, had never sanctioned it in England, and it formed no part of the system of the society there. In consequence of this declaration, it was proposed at the annual conference at Hallowell, in August 1832, that the church or society in this province should relinquish episcopacy; and, upon discussion and deliberation, the annual conference at that meeting passed a resolution "recommending the general conference to pass the third resolution of the report of the committee of that conference on the proposed union," which reads as follows—"That *Episcopacy be relinquished (unless it will jeopard our church property, or as soon as it can be legally secured), and superseded by an annual presidency*;" and the annual conference recommended their chairman to call a *general conference* on the Monday following, which was done. This recommendation to relinquish episcopacy was voted for by three-fourths of the members of the annual conference.

In pursuance of the resolution of the annual conference, a special meeting of the general conference was called, and assembled at Hallowell on the 12th of August 1832, (a few days after the deed before us was executed): an elder of the church was elected by the conference their president for the time, and the general conference at this meeting came to the following resolution:—"Resolved, that this conference, on the recommendation of three-fourths of the annual conference, having in view the prospect of a union with our British brethren, agree to sanction the third resolution of the report of the committee of the annual conference, which is as follows—to wit, 'That Episcopacy be relinquished, (unless it jeopard our church property, or as soon as it can be legally secured,) and superseded by an annual presidency—in connection with the 10th resolution of the said report, which says that none of the foregoing restrictions shall be considered as of any force whatever



until they shall have been acceded to on the part of the Wesleyan missionary committee of the British conference, and the arrangements referred to in them shall have been completed by the two connexions."

This resolution was carried by the votes of three-fourths of the members of the general conference, and by the unanimous vote of the members present. Other resolutions were in like manner passed, providing for the performance of those duties which had before been discharged, or rather appointed to be discharged, by a bishop. Instead of electing a bishop by the general conference, a president was to be named annually by the conference in England; or in default of their naming one, the Canadian conference was to choose one from among its own members. All these arrangements were provisional, and depended on the Wesleyan conference in England according to the union. They did accede to it, in August 1833. And the act of concurrence of the British conference being received in Canada, and the resolutions adopted at Hallowell having been published in the meantime in a newspaper in this province printed under the direction of the Methodist body, the whole arrangement received the final confirmation at a general conference at Toronto, in October 1833.

As respects the regularity of the proceedings in the conference at Hallowell—it appears that the annual conference met at the place appointed by themselves at their previous sitting as their discipline provides. The *time* of their assembling, according to the book of "Discipline," was to be appointed by the bishop; but, as there was then no bishop of the church in Upper Canada, I infer that the time of the meeting was appointed by the general superintendent. I recollect no objection being urged on this score in the argument last term.

The annual conference, by the constitution, was to consist of all travelling preachers who were in full connexion, and those who were to be received into full connexion. It is proved that upon this occasion it did consist of travelling preachers who had travelled two years, and who had been received into full connexion, and of these the requisite proportion of three-fourths voted for the change.



Then as to the general conference. It appears to have been a special session called by the superintendent or chairman of the annual conference, with the advice of the annual conference; and the "Discipline" declares that a special meeting of the general conference may be so called "*at any time.*" According to the "Discipline," the general conference should have consisted of all the travelling elders who had travelled four full years last past, and had been received into full connexion; and two-thirds of the general conference were necessary to make a *quorum* for the transaction of business. Upon this occasion, there having been no bishop in the province for some time by whom elders could be ordained, the general conference proceeded, in the first place, to make a rule which they assumed to be within their power, admitting *preachers* into full connexion who had travelled four years, to be members of the conference, although they were not ordained elders.

There were many such preachers who, if they had been ordained, would have been entitled to be admitted members of the conference; and, as they were prevented by circumstances from obtaining ordination, the conference made this rule in order to admit them.

The change admitted those only who would have been elders if there had been a bishop to ordain them. In fact, according to the "Discipline," preachers who had travelled *two* years were eligible to the order of elders. Notice had been previously given that preachers who had travelled *four* years would be admitted members to that general conference. At the conference, the elders who were before members made a rule accordingly, previously to the discussion of the proposed union; and upon this rule these additional members were admitted. But the vote for the union was not carried in consequence of this addition; the result without them would have been the same. The only effect was to make the conference more numerous, and of a more popular character. In all thirty-one members were assembled, of whom *fourteen* were preachers not in elders' orders; whether these were reckoned or omitted, the resolution still received the concurrence of three-fourths of the body.



It seems not to have been proved at the trial whether notice was or was not given to the members of the annual conference before the meeting at Hallowell, which seems to have been an ordinary meeting, of an intention to propose the changes which were there resolved upon; nor does it appear in the notes of the trial what proportion of the general conference, being elders, did in fact attend the conference, or of those who could be admitted under the new rule; nor does it appear whether all were apprised of the meeting, and of changes intended to be proposed there, so that they might have attended if they desired.

I shall notice by and by any questions of irregularity that seem to arise upon these proceedings; at present I state the facts as I find them in the notes of the evidence.

At the general conference held in Toronto in October 1833, when the union with the British Wesleyan Conference and the attendant regulations were confirmed, and after the assent of the society in England had been made known; several members of the British Wesleyan conference were present, and after the vote of ratification was taken, but not before, they were requested to take seats.

Upon the change being made in 1833, in pursuance of the resolutions of the annual and general conferences, the name assumed by this religious community was "*The Wesleyan Methodist Church in Canada.*"

Afterwards the general conference at Toronto substituted for this the name of "*The Wesleyan Methodist Church of British North America,*" and in 1834 the name was again changed to "*the Wesleyan Methodist Church in Canada,*" which name the society now bears.

In 1834, a new book of doctrines and discipline was published, by order of the conference. In this the articles of religion are retained word for word unchanged; but in the government of the church or society there are many points of difference, which I have thought it necessary to note, as they should all receive consideration in determining upon the extent and consequences of the change that had taken place in the society.

Under the *new* "Discipline" there is but one conference, which is an annual conference.



Under the *first* "Discipline," the general conference was composed of all the travelling elders who had travelled the four last years, and had been received into full connexion.

According to the second or new "discipline," the conference is to be composed of all preachers who have been received into full connexion, and have been appointed by the district meetings to attend ; also of all preachers who have been recommended by their district meetings to be received into full connexion.

According to the first, one of the general superintendents shall preside in the general conference ; or if none be present, the conference shall choose a president *pro tempore*.

According to the second, the president appointed by the British conference, or where none is thus appointed one chosen by ballot, shall preside in the conference.

By the first, the general conference is restrained from changing or altering any part or rule of government so as to do away episcopacy or destroy the plan of the itinerant general superintendency.

By the second, the conference shall not change, or alter, or make any regulations that will interfere with or infringe the articles and plan of union between this and the British conference proposed in August 1832, and agreed to by the British conference in August 1833.

By the first, the *restriction* as to episcopacy may be altered by three-fourths of the general conference, on the recommendation of three-fourths of the annual conference.

By the second, the article respecting the *union*, which stands here in place of the other, (*i. e.* the restriction,) shall not be *done away or altered* without the recommendation or consent of the British Conference.

By the first, the general conference was to sit once in four years, at a time and place named by themselves ; but the superintendent and annual conference might call a meeting of the general conference at any time.

By the second, the conference shall appoint the time and place of its own sitting.

By the first, bishops are to be elected and ordained as before noted.



By the second, the British conference shall have authority to send each year one of its own body to preside in the conference ; the same person not to be sent oftener than once in four years, unless at the request of the conference.

When the British conference sends no president, the conference here to choose, by ballot, one of its own members.

By the first, the *bishop* was to make the appointments of preachers to the several stations, circuits, &c., and to do several other acts of this nature, besides ordaining elders and deacons on the election of the conference.

By the second, the *president* is to perform these duties, and to ordain the preachers admitted into full connexion, with the assistance of three or four of the senior preachers ; and he is amenable to the conference for his conduct as the bishop was : but whether he can be suspended or removed, as the bishop could, is not (I believe) expressly declared.

By the first, presiding elders are to be chosen by the bishop to travel through appointed districts and exercise a superintendence therein in matters specified.

By the second, there is to be a chairman of a district appointed by the president, whose duties are very similar ; and there is a provision for district meetings, to supply for some purposes the place of annual conferences, which are abolished, and to exercise in several other respects a vigilant superintendence over the preachers and members, and the general interests of the society. New regulations also are made as to receiving preachers on trial and into connexion.

Under the first, presiding elders, travelling elders, deacons, and travelling preachers, were the orders in the church.

Under the second, there are no elders (so called) or deacons, but travelling preachers, whose duties seem to be the same as under the former "Discipline ;" and ministers, who have been travelling preachers, are to be elected as elders were, by the conference, and ordained by the laying on of the hands of the president and some of the ministers present—their functions are such as the elders used to discharge.



Under the first, an elder, deacon, or preacher who has the special charge of a circuit assigned him had various duties to discharge.

Under the second, the *preacher* on each circuit, who is appointed to take charge of the societies therein, is called a superintendent, has similar duties to perform, and additional duties embracing many minor details.

By the first, the ordination service for elders was given to be performed by the bishop.

By the second, the same service exactly, only putting *minister* for *elder*, is given to be performed by the president.

Under the first, there was a general conference, which met once in four years, and an annual conference.

Under the second, there is to be but one conference in Upper Canada, which shall meet once in each year.

By the first, it is directed, as to their churches, that there shall be a condition in all their deeds that the trustees shall, at all times, permit such ministers and preachers belonging to the *Methodist Episcopal Church*, as shall be duly authorized by the general conference, or by the annual conference, to preach, &c., according to the true meaning and purport of the deed of settlement.

By the second, the same constitution is prescribed in respect of such ministers and preachers belonging to the *Wesleyan Methodist Church*, as shall be duly authorized by the conference of the ministers of "our" church.

The form of deeds to be taken closely corresponds, having merely the above difference.

I have thus traced the course taken in bringing about the change, upon the consequences of which we are to decide. I have done this, I believe, with no unnecessary minuteness, considering that the question is of a delicate nature, and unusual in courts of justice; and considering also that the consequences of the decision may be extensive and important to a great number of persons. The most of what I have mentioned rests on documentary evidence, but some of the facts stated depend on the *viva voce* testimony of witnesses examined at the trial.

On the one side, two ministers of the Wesleyan Methodist



Church in Canada, as it is now styled, were examined. These had been elders or ordained ministers of the church before the change, and were members of the general conference when the change was made, and took part, it appears in the proceeding.

Besides relating the facts in the order in which they occurred, they gave it as their opinion that the change was such as the general conference, on the recommendation of the annual conference, had a right, by the constitution of the society, to make; and that the proceedings adopted by them were in exact accordance with the constitution. They declared that relinquishing episcopacy and uniting themselves to the British Wesleyan Society were measures unconnected with doctrine, and affected only the government of the church: that the doctrines were the same now as before; that the same society continued with the same conference, and the same members: and that the same churches that were used by the Methodist society before continue still to be used; the same doctrines being preached in them, and the same persons in connexion with the society: that, in short, the original Methodist society remains, though under another name, and though changed in the particular of Episcopacy: that the laymembers of the church never had a voice with respect to doctrine, government, or discipline: and that they are not affected by the change which has been made.

On the other side, a member of the former Methodist Episcopal Church in Canada was examined as a witness. At the time of the change he was merely a local preacher, and was never ordained as an elder. By the constitution of the church he was a layman, having no voice in the general or annual conference. He declared that he did not assent to the union in 1833: that, in his opinion, the Methodist Episcopal Church was not merged in consequence of the change, but existed, and had a right to exist, as before, retaining as members those who adhered to her, and who were dissenting from the change: that after the change a general conference of the Methodist Episcopal Church was held in the Home district in 1833, conforming



as nearly to the discipline of 1829 as they could, considering the state in which they were left: that they have a bishop, whom they elected in general conference in 1824, but who is not ordained or consecrated, being only appointed as general superintendents were formerly. They have held, he says, general and annual conferences since, and quarterly conferences, going as near to what the discipline requires as they could: that two of the general conference elders remained in them after the change, and two travelling preachers; and in the exigency they acted as if by some unforeseen casualty all the elders and preachers who had joined the British society had died or left the country; and they admitted to the conference the preachers that remained.

On the other side, however, it was denied that the two persons spoken of as elders were actually elders; or that, conformably to the Methodist discipline, any such conferences could exist and be holden as the witness spoke of.

Whatever may be the merits of the change then, it is clear that it has given rise to a schism in the Methodist society—it has split it into two parties, each maintaining that the other has seceded from the religious community which existed under the Methodist “Discipline” of 1829; and, acting under these conflicting pretensions, they have become involved in litigation concerning the possession of this church and burying-ground in the township of Kingston. The disunion extended to nine trustees, who took the legal estate under the deed from Ferris—and the conduct of some among them seems to have been rather equivocal and undecided, so that it is difficult to say what is conclusively established respecting them upon the evidence.

Michael Purdy, Vanalstine, Abernethy, and Orser continued members of the society after it had relinquished Episcopacy and united itself to the British Wesleyans—or rather, they went with the conference, and with that portion of the society which approved of the change; Lattimore, I believe, did the same, though this is doubtfully stated. Gilbert Purdy, and Wartman also assented to the change,



and continued to act with those members of the society who adopted it ; but, in order to avoid a disagreeable contest about the trust, they withdrew formally from the society, that they might be thereby discharged from the trust, and they immediately afterwards rejoined the society—that is, the church as now governed under the new discipline.

Powley, it seems, continued with the church under the new “discipline” for some months, and then requested permission to withdraw from the connexion, which was granted to him. Grass was in connexion with the church, as governed after the union, for some time ; but afterwards, in 1834, omitting to conform to its regulations, was admonished, upon which he renounced the church, said he was no longer a member, and his name was taken off the list. Indeed Powley and Grass, it seems probable, never approved of the change, though they seem to have conformed outwardly for a time. On the 10th January 1835, Grass and Powley, calling themselves “*surviving trustees*,” executed a writing, stating “that Wartman, Gilbert Purdy, Vanalstine, Orser, Michael Purdy, Lattimore and Abernethy *had ceased to be members of the Methodist Episcopal Church in Canada*, by uniting with and becoming members of the Wesleyan Methodist Church in British North America, and had thereby forfeited all their capacities, powers, &c., as trustees (for the premises now in question) ; and that, according to the “Discipline” of the Methodist Episcopal Church and the deed for the church and ground, &c., they appointed seven other persons, named in the writing, to be trustees of the Methodist Episcopal Church in the township of Kingston instead of the above named persons.” This appointment is stated to be on the nomination of Thaddeus Lewis “*preacher in charge of the circuit*,” the same person who was examined as a witness, and who stated that he dissented from the change, and that, in his opinion, the Methodist Episcopal Church still existed as a separate body in Upper Canada. On the 14th of March 1835 four new trustees were nominated by the stationed preacher under the new “Discipline,” and appointed to fill



up the vacancies made "by Powley, Wartman, Gilbert Purdy, and Grass *ceasing to be members of the church.*"

The first appointment (of the seven trustees) was made, it will be perceived, on the part of those members of the Methodist Society who refused to accede to the union, and who profess to be still governed by the discipline of 1829. The latter appointment was made by the Wesleyan Methodist Church in Canada, as governed under the new discipline of 1834.

Bell, the defendant in this action, was put into possession of the church some time in the autumn of 1835 to take care of it and keep the keys; possession was given to him by five of the original trustees, grantees in the deed—viz., Vanalstine, Michael Purdy, Orser, Lattimore, and Abernethy; and the attempt to eject him by this action is made by, or at least under, the sanction of Grass and Powley, two of the original trustees, grantees in the deed, and the seven new trustees appointed in January 1835, on behalf of those calling themselves the Methodist Episcopal Church in Canada.

Upon this case being proved at the trial at Kingston, and the defendant's counsel declining to assent to a special case, the learned judge before whom the cause was tried gave no opinion upon the legal effect of the evidence, but directed the jury to find for the plaintiff, leaving the defendant to move against the verdict in term, upon the law and evidence. A rule was granted last term, upon motion of the defendant, to shew cause why the verdict should not be set aside, as being contrary to law and evidence; and the case having been fully argued on the return of the rule, it remains for us to determine whether the verdict which has been rendered for the plaintiff can be sustained.

The deed under which the plaintiff makes title conveys the land to nine persons by *name*, to hold to them and their successors by the corporate name of "*The trustees of the Methodist Episcopal Church of Kingston.*"

This ejectment is brought upon a demise made by "*The trustees of the Methodist Episcopal Church in the township of Kingston.*" It is apparently the trustees using the



corporate name in a suit to gain possession of the trust property—and this the provincial statute clearly allows.

In an ejectment we are to inquire where the legal title resides : and from the deed it is shewn it must reside in this corporation, unless they have conveyed away the estate, which is not pretended ; so that in the plaintiff's case no opening seems left for a question, since the right of Ferris to make the deed is admitted on all hands.

If it, indeed, were shewn that at the time of the demise laid there were, in fact, no trustees to represent the trust, and to compose the corporation, that would be fatal to the plaintiff's recovery, on the same principle as proof of the death of the lessor of the plaintiff at the time of a demise laid in an ordinary action, because it would shew the title to have been residing somewhere else. Whether it would revert to the donor in this case, it is not necessary to inquire.

It is not denied that there are still trustees entitled to use this corporate name, and, whoever they may be, they must be entitled to the possession of this property.

We see two sets of persons coming forward and saying, “ we are the trustees, holding the legal title to the estate ; the others, who pretend to be trustees, have nothing to do with it.”

The one party affirms that they are the body of “ *trustees for the Methodist Episcopal Church in the township of Kingston,*” including in their number some of the original trustees who were grantees in the deed of trust, and others who have been legally appointed to succeed certain of the original trustees who had *ceased to be* members of the Methodist Episcopal Church in Canada, and appointed as the deed directs (being members of that church) upon the nomination of the stationed minister or preacher in charge of the church for the time being *within whose station or circuit the land is*, and approved of by the remaining trustees.

The other party affirm that *they* are the body of trustees who alone are legally seized of the estate, including in their number some of the original grantees in the deed of trust, and others nominated by the stationed minister or preacher in charge of the said church for the time being



within whose station or circuit this land is, and appointed by the remaining trustees to fill up vacancies, which arose, they say, in this way :—The grantees in the deed, under the corporate name of the Methodist Episcopal Church in the township of Kingston, were to hold this land in trust for the site of a church and burying-ground, “*for the use of the members of the Methodist Episcopal Church in Canada, according to the rules and discipline which at that time were, or which might thereafter be adopted by the general or annual church in Canada.*” When this deed was given the Methodist Episcopal Church in Canada existed (they allege) as an independent community, amenable to none other, and governed by written constitution, which they shew, and which provided for the government and discipline of the church.

By that constitution no voice is given to the laity in matters of government or discipline, but the supreme control and the whole legislative power rested in a general conference of their clergy, by which conference (they say) certain changes were made in the system of their church government and discipline in 1832, a short time after this deed was taken ; and upon these changes certain of the trustees named in the deed refused to adhere to the church, so altered in its government and discipline, and have not partaken of its ministrations : that, as the changes were within the power of the conference to make, the whole society was bound by them : that the same religious body continued to exist, though altered in its form : that the trustees who would not subscribe to the change, but renounced their connexion with the church, (as they had a right to do,) ceased to be members of the church ; and that successors were therefore appointed in the manner provided by the deed and allowed by the statute.

On the part of those who rejected the change it is replied, that the conference have pretended to abolish an essential fundamental principle of the society : that this was beyond their power : that they have erected for themselves a new church, and not merely altered the one which existed : that *they* are the seceders, while the others remain, as they were,



members of the Methodist Episcopal Church in Canada ; and have supplied the vacancies occasioned by their secession as the trust deed points out, or as near it as the state of things permitted.

Thus each lays claim to represent that legal title which would warrant the demise in this ejectment.

The court has not been moved at any stage of the cause before the trial to stay the proceedings, on the ground that the persons suing in the corporate name have no right to use it, nor any interest in the estate, and that the right to use it resides in others who are not assenting to the action ; but the question, who are seized of the legal estate ? comes before us directly in this way :—This action is brought at the instance of those who rejected the change made in 1832 : the defendant is in possession under those of the original grantees who recognize the change and adhere to the church, as they say, under its new form of government ; and he defends by setting up their title. If *they*, or any of them, had the legal estate in July 1835, (the time of the demise laid,) then the defendant was not a trespasser, and was entitled to a verdict.

We are called upon, therefore, to decide whether the seven original grantees, whose places in the trust the plaintiffs have assumed to be vacant, did really *cease to be members* of the Methodist Episcopal Church in Canada, according to the proper construction of the trust deed, when they joined themselves to, or continued members of a body of Methodists who relinquished episcopacy as a quality of their church, and united themselves to the British Wesleyan Society.

And this brings up three questions—

1st, *Could* this be done by those who attempted to do it?

2nd. Did they do it effectually—that is, regularly?

3rd. After it was done did there exist a Methodist Episcopal Church in Canada capable of being governed under the “Discipline” of 1829 ; or was that body of Methodists transformed into the Wesleyan Methodist Church in Canada, and so transformed that it carried with it its original rights, being sufficiently identical in substance with the former Methodist Episcopal Church?



It is to be regretted that such a contest has arisen : the questions it involves affect numerous bodies of christians, and its agitation must be unfavorable to their tranquillity, and while it lasts must in some degree impair the usefulness of their exertions in the cause of religion. Similar difficulties have occasionally sprung up in this province and disturbed the harmony of other religious communities. As we have unfortunately nothing but this court of common law jurisdiction, and are without the aid of a court of equity, which can controul trusts, direct their proper execution, and restrain actions when they are brought for purposes contrary to the intention of the trust, such cases as the present are in this province peculiarly embarrassing. I doubt whether the question before us can receive its solution quite satisfactorily by the judgment of a common law court ; and it would therefore be well, perhaps, if the parties concerned had sought relief from their difficulties by some equitable legislative enactment.

And yet I do not know that a conclusive and convenient remedy could be obtained in that manner. That the legislature should apply themselves to investigate the merits of particular cases, with a view to provide for each by a separate act, could hardly be expected ; and the attempt to prevent such contests by any general measure, I apprehend, would be difficult. If it should be the effect of any such general measure to uphold a minority against the prevailing opinion and wishes of a greater number, the very desirable object of security, peace, and harmony might fail to be attained ; and to establish it, on the other hand, as a general principle, that the will of the majority of a congregation or church should in all such cases govern, might tend to the sanctioning in some instances of manifest injustice and oppression, and would, besides, lead to great evils of another kind. The best remedy, perhaps, in such cases is to resort to the jurisdiction of a chancellor, who can direct inquiries, make decrees, according to the equity of the case, and restrain the trustees from employing legal remedies to the perversion of the trust ; and who has, besides, the power, when it is necessary, of referring to the judg.



ment of a court of law any strictly legal question which it may be necessary for him to decide.

The late case of the Attorney General v. Pearson, 3 Merivale, 409-418, shews how a Court of Equity interposes its jurisdiction in such contests. Fortunately they have not been very numerous in England, either in law or equity; and in most of the cases which have come before a court of equity it will be found that they are treated as subjects of litigation, embarrassing in their nature, and very difficult to be dealt with in a satisfactory manner. Generally, as in this case, the question borders upon a religious controversy, in which the judgment of a court will hardly be considered as conclusive authority; and it arises in consequence of voluntary associations of persons formed upon principles, and for purposes, of which the law has not taken cognizance, and has therefore made no provision for their regulation.

In *Foley v. Wortner*, (2nd Jac. & Walker 247,) a case of this description, the Lord Chancellor expresses his sense of this difficulty in striking language—"I am almost afraid," he said, "that I am doing what may subvert the peace of many religious societies in shewing the infirmities of the law on this subject."

But, although we are compelled in this case, to entertain consideration of matters rather foreign to the usual subjects of judicial decision, the question itself—in whom is the estate vested?—is, strictly speaking, a legal question, and is raised for a purpose strictly legal. We are not here inquiring who are the *cestuis que trust*, but—are the trustees, according to the legal construction and effect of the provisions in a deed, supported by a public statute?

The opinion I have formed is in favour of the defendant. I should not have been quite free from doubt, in coming to that conclusion, if my brothers had agreed with me; but as I believe they both differ from me, though on different grounds, I can by no means have that confidence in my judgment which I should desire to feel in a case of such a nature, and where the decision may apply so extensively. If I am wrong, it is fortunate that the opposite opinions of



my brothers will prevail. They have been formed, I know, after laborious investigation.

We must consider this question in two respects—

1st, We must look at the authority which the conference had to make so essential a change as was made in 1832, and the effects of that change upon the previously existing society.

2nd, We must consider how this change and its consequences have operated upon the legal estate assured by the deed before us, allowing to the provisions of the deed their proper effect.

To enable ourselves to form an opinion upon certain points in this case, it has been necessary to look minutely into some matters which had before, in my own instance at least, not attracted more than a passing interest; but, independently of the necessity for this research, the trouble has been in several respects well repaid.

The rise and expansion of Methodist Societies—the astonishing zeal, perseverance, and single-minded devotion to the cause, which actuated their remarkable founder—the absolute control which Mr. Wesley acquired and exercised in the minutest particulars throughout the whole connexion, widely dispersed as its members were, and which he maintained to the end of an unusually long life—the exclusiveness with which that influence was confined to spiritual objects—the fidelity with which the Methodist connexion still conforms to the course he marked out for them—the provision made by the Methodist discipline for maintaining a constant and active control over all their members—cannot pass in review before the mind without exciting a deep interest.

It has been necessary to trace the history and proceedings of Methodist societies, in order to be able to appreciate the relation between the governing body and the people. A Methodist society is a purely voluntary association. It is not, like a civil corporation, a creature of the law; and we cannot therefore expect to be able to apply precise principles and authorities of law in settling the dissensions that may spring up among them: neither can we say here, as in



the case of religious establishments connected with the state, that the relations between the different orders of the church, or between the clergy and their flocks, and the consequent rights, and powers, and duties of each, have their origin in legal sanctions, or have been regulated by positive laws, and are therefore capable of being brought satisfactorily to the test of legal authority and precedent. When the conduct or acts of these voluntary associations, or of the members composing them, are within the operation of those general rules which regulate matters of right between man and man, the law makes no difference against them or in their favor, and a decision may in general be rested on some definite and ascertained principles; but when a contest has sprung up amongst them, in consequence of arrangements amongst themselves, purely internal and relating to their peculiar government as a religious community, we must look into their past history and present state, in order that we may be able to place a just construction upon their intentions, and to estimate the effect of their arrangements. We must know the history of their conferences, for instance, and the deference which in practice has been paid to their rules and decisions, before we can judge whether the definitions given of their powers in their printed "Discipline" may safely receive a construction according to the strict letter, or whether it must not be taken with some qualification which is not expressly stated.

And so also, before we can form an opinion as to the consequences of a Methodist Episcopal Church relinquishing episcopacy, we must consider how episcopacy came to be introduced, or on what footing it was received, and whether it is right to regard it as so bound up with faith and conscience among that portion of the Methodist connexion which received, that the relinquishing it is like taking away a vital part, and must necessarily leave the body no longer existing.

From the information I have been able to acquire respecting Methodism, I am under the following impressions: Mr. Wesley, its founder, was never otherwise than a member of the Church of England, of which he was an ordained



clergyman in priest's orders. He never accounted himself the founder of a new sect, nor would admit that he was a dissenter. He conformed to the ordinances of the church, and assented to her doctrines, differing only in this respect—that he insisted more earnestly upon the necessity of inculcating some particular articles of her faith, and laboured more earnestly to give them a practical application. As his great object was to produce a greater fervor of devotion, and a more perfect spiritual-mindedness, he addressed himself unreservedly and without exception to all who would give him their attention. He did not make conformity to the doctrines of the Church of England a condition upon which his services were to be imparted, and he announced no new doctrines of his own. His followers included Church of Englandmen, Presbyterians, and dissenters of various denominations; and it seemed to be in no degree his object or desire that they should look upon themselves as a distinct sect; on the contrary, he discouraged to the utmost, during an active ministry of half a century, everything that manifested such a tendency.

At first he availed himself only of the services of such clergymen of the Church of England as would unite with him in the duties to which he devoted himself. Among these his brother was most distinguished. For a time no irregularity marked his course; he always expressed an anxiety to avoid even the appearance of it. He preached only in parish churches so long as no obstacles were presented to his admission there, and when he preached at first in other places he justified it on the ground of necessity. It was not without much reluctance that he first administered the sacrament in any other place than one of the established churches; he continually urged his followers to attend divine service and receive the sacrament in their proper churches whenever it was possible, and he forebore himself to preach on the Sabbath during the hours of divine service when the churches were open. He evinced a strong repugnance on the first occasion of a layman proposing to preach to the people, and would have put down the attempt at the time if he could. To what is called



lay-administering he constantly and firmly opposed himself, not thinking it right or justifiable, in any point of view, that persons not in holy orders should dispense the sacraments or perform any of the offices of the church, such as baptism or the solemnization of matrimony; and, consequently, until a short time before his death, although the lay-preachers were numerous, and became most efficient assistants in the work which he was engaged in, their duties were confined to preaching, and their bearing their part in enforcing that internal discipline and economy which he established as a bond of union among the members of his society. His followers received the sacraments of the church at the hands of the regular clergy. Whatever might be the inevitable tendency of some of his measures, his avowed desire was not to separate them from that church, but to make them more pious members of it.

The relation between him and his people was, from these circumstances, simple and intelligible, and the energy of his character occasioned it to be felt so long as he remained among them. He managed the concerns of his societies as he pleased, and exacted implicit obedience. He was not inviting proselytes to his doctrines, and he held out therefore no particular privileges, and suffered no participation in his authority on the part of his people whom he was serving, nor in truth by any one, except as he might choose to invite him to his assistance, when he prescribed him his duty and his place, and laid down rules for his conduct in the minutest particulars.

When the first conference assembled *he* called it together, and convened whom he chose for the purpose of advising with him, and with their aid he laid down rules for the government of the society. These conferences afterwards, by his arrangement and appointment, met periodically, and became a prominent feature in the system, but they took their rise only in his will: the laity were to no intent and for no purpose admitted to them: they arose from no compact with his followers: they were not set up as a protection between the laity and his authority; they were merely called by himself to assist him in laying down rules for the



government of the Methodist people, and to these rules they must conform or be no longer members. A stricter superintendence has perhaps never been devised, or been more directly and absolutely enforced. The conference from time to time reviewed the doctrines of the society; and, for all that I can see, in matters of government and discipline while Mr. Wesley was at its head it was absolute and supreme.

Lay preachers, when they had proved their qualifications, were received by him, and their stations and duties were assigned to them. As Methodism extended itself, these commenced their labours (of preaching merely) throughout the kingdom, and afterwards in Ireland, the West Indies, and the American Colonies on the continent. Before the American revolution several preachers had found their way to the colonies, and congregations were formed there; but there, as in England, they resorted for baptism and the sacrament of the Lord's supper to the ministers of their respective churches—that is, to ordained clergymen. In the Southern States particularly there were many missionaries of the Church of England; and before the war commenced, these and the clergy of the other churches—Presbyterians, Baptists, &c.,—supplied those offices of religion which could not be obtained from the Methodist lay preachers, for these last not being in orders of any church, their flocks formed no distinct religious denomination; they regarded themselves, and were accounted by Wesley, as all members of the one Methodist connexion, of which he was the head, and which throughout his life he declared to be in perfect connexion with the Church of England, of which he was a presbyter. So far Episcopacy gave rise to no question among the members of this society, or with its founder, because, like the members of the Church of England, they had it as part of their actual church government.

Wesley, indeed, did not seem to be strongly impressed in favor of the sacred origin of Episcopacy; he regarded the term "*preacher*" as importing the same thing with evangelist; "*bishop*," or pastor he seemed (in the latter part of his life at least) to rank with the presbyter



But, as the Episcopal Methodist "Discipline" explains to us, from the war in America and its consequences, a difficulty arose there on account of the want of ordained clergymen. Those belonging to the Church of England had been compelled to leave the country. The Methodist preachers even, who had gone from England, had returned thither, with only one or two exceptions, I believe ; and there was no member of the society who could dispense the sacraments. Mr. Wesley was applied to in this exigency : he would rather, if he could, have supplied the want by procuring ordination from a bishop in England of persons willing and qualified to engage in the ministry ; but the Methodists had gradually, and principally by the conduct of others, which Mr. Wesley lamented but could not always restrain, separated themselves, in appearance at least, more and more from the church ; there were also political difficulties in the way, and he did not succeed in procuring ordination as he desired. He seems at last, with reluctance, to have brought himself to the opinion that as a presbyter he could himself give ordination, that the same reason of respect for and conformity to the national church which had prevented his exercising such an authority in England, did not apply as regarded America—now become a foreign country—and justifying the course partly on the ground of his office as a presbyter, and partly on the necessity of the case, he joined with two other ordained presbyters of the Church of England, who were members of his society, in conferring ordination upon two lay preachers, who were to accompany Dr. Coke to America. He then ordained Dr. Coke, who, like himself, was a presbyter of the Church of England, to be a *superintendent*.

Dr. Coke, arriving in America, assumed, with the sanction of the conference at Baltimore, the name and office of bishop, perhaps with the previous approbation of Mr. Wesley ; and with the assistance of the presbyters of Mr. Wesley's ordination, he ordained Mr. Asbury to be a bishop, having conferred upon him the orders of deacon and elder.

Thus the American Methodist Society became a Methodist Episcopal Church. I find it stated that *sixty* preachers



out of *eighty-one* attended the General Conference at Baltimore, when these arrangements, made and sent out to them by Mr. Wesley for the government of the church, were proposed to them—or, perhaps I should rather say, brought before them; and that they accepted and established the form of church government for the Methodists in America which Mr. Wesley had recommended. By this form, the orders in the ministry were Bishops, Elders, and Deacons.

I believe I am correct in saying that Mr. Wesley, after this arrangement and to the time of his death, regarded all the Methodist Societies as composing one people, and did not consider that those in America had separated from him when they adopted the form of government and discipline which he recommended to them. I believe I am also correct in saying that the Conference at Baltimore, in receiving it, received it as from an authority entitled to prescribe it, or to which at least they were willing to acknowledge submission, as to the governing power of the Methodist Society. In their printed “Discipline,” however, (and this, I think, it is very material to the present question to determine), they seem to have contemplated, as the Methodist Episcopal Church did here, the possible event of the conference desiring to abolish or relinquish Episcopacy; and they guard it by a similar provision to that which appears in the Canadian “Discipline” of 1829—that is, that they shall not do so unless by a certain prescribed mode of proceeding by the conferences.

How Episcopal Methodism came to be introduced into Canada has been already explained; and I will only add to this statement that I find that Mr. Wesley did, in 1787, after he had made this arrangement for meeting the exigency of circumstances in America, depart from the scruples he had before entertained, and did actually ordain two preachers in England.

Since his death, I conceive that the conference, with a president or superintendent at its head, exercises in England the same rule over the Methodist Connexion as Mr. Wesley, with the advice of his conference, had been



accustomed to exercise; and that no change has taken place in the Wesleyan Society which places the Conference on a different footing as regards its relation to the members generally. I infer also, that in the Society as it is now governed, that difficulty is not felt to exist which induced Mr. Wesley to resort to the expedient of ordaining a bishop or superintendent for America, but that ministers, whose functions correspond to those of elders among the American Methodists receive ordination now within the pale of their society—that is, from ministers who have been themselves ordained by Methodist ministers.

In speaking of things with which we are not familiar we may easily fall into error. I have purposely avoided any attempt to discuss points that may have been the subjects of controversy, and have merely endeavoured to review, in very general terms, the proceedings of the Methodist societies, stating facts which I believe not to have been disputed.

And, after considering these facts, and perusing the written constitution under which the society existed here in 1829, I am not prepared to say, that even if episcopacy were a question that touched the doctrines and articles of belief, it was therefore clearly beyond the control of the general conference. I see in the "Discipline," and in the history, and in the nature of Methodist societies, much reason to think otherwise; and that the members, both clerical and lay, must go with the conference; or, if they part, it is they that leave the society, and not the conference that leaves it.

Councils and governing bodies in churches have in all ages laid down standards of doctrine for their people, and have from time to time varied and expounded it in matters which seemed of doubtful interpretation, or questionable as to the necessity of believing and conforming to them; I do not mean to say that they are at liberty to depart from what are plainly fundamental articles of their religion in their respective churches.

But I cannot pronounce that Episcopacy should be taken to have formed in the Methodist *Episcopal* Church in



Canada (notwithstanding their name) a principle in that church bound up in faith and conscience.

Their articles of religion (which, by the way, their conferences seem to have settled and handed down to them) make no mention of it. Indeed, by comparing (as I have carefully done,) the points from which they depart from the articles of the Church of England, we shall find that they seem studiously and designedly to have avoided alluding to Episcopacy as embraced in the articles of their faith. In our 32nd Article it is said, "Bishops, Priests, and Deacons are not commanded by God's law to vow the estate of single life, or to abstain from marriage, &c." The corresponding article in the "Discipline" of 1829 says, "*The ministers of Christ* are not commanded by God's law either to vow the estate of single life, or to abstain from marriage, &c."

There is a designed omission of the word "bishop" in these articles, as published by the Methodist Episcopal Church. The 23rd article of our church is not adopted in the Methodist "Discipline," probably because they were unwilling to bring themselves within any express restriction, as to the authority by which persons should be called to the office of preaching and administering the sacraments.

For anything that I can discover, I believe Episcopacy to have been among the Methodists in the United States and in Canada only a feature of their church government, and not in any degree connected with faith and doctrine; and if that point be doubtful, I consider that the general conference, in whom, by constant assent and the practice of these societies, the governing power was vested, are more entitled to solve the doubt than I am.

I must see and know that they are indisputably wrong before I can overrule their judgment on a point of this kind. It is a prominent feature of the Methodist "Discipline" that they seek as much as possible to preserve within their societies the adjustment of disputes between members, even when these regard their temporal interests and rights, which are the proper subjects of legal decision; and unless I can see something plainly set down in the consti-



tution, to which this religious association have bound themselves, upon which I can found my opinion, I should hesitate to set my judgment in opposition to that of the conference upon the question affecting the doctrines of their church. To prevent schism or anarchy, it is fit, at least in all doubtful matters, that those subordinate to the conference should be bound by their decision; and especially if it be conformed to by the majority of the whole society.

When episcopacy was introduced into the United States it had not been asked for in terms, nor in truth was it recommended in terms, further than that the society wished that a *superintendent* should be provided for them; and Mr. Wesley sent them a *superintendent*. Dr. Coke, when he arrived there and had seen Mr. Asbury, called himself a bishop, and the conference agreed to call him bishop—seeming by this to look upon bishop and superintendent as pretty much the same thing: all they wanted was a superintendent who had received and could transmit ordination to others.

I do not believe, nor do I suppose that the conference (that is, the governing power in the Methodist society in America) believed that Mr. Wesley had any divine right to engraft episcopacy upon them, or to make that a matter of faith and conscience which was not a matter of faith and conscience before: nor do I believe that Mr. Wesley considered it as a point of faith or conscience that a Methodist society anywhere should have a bishop within itself, *eo nomine*, ordained by him, and transmitting by devolution the authority of this sacred office from him, because if these had been his sentiments he would have called himself a bishop, (as indeed in effect he was to all intents among his people), or he would have ordained a bishop for the society in England. If he thought it unnecessary there, because the Methodists had never separated from the Church of England, and therefore had their bishops, he must have thought it, for any other purpose except ordination, equally unnecessary in the United States; for, if there were any other duties which conscience or other article of faith



required should be performed within their society by a person expressly bearing the name and office of a bishop, they must have been without the regular performance of these duties in England as well as in America, since it is clear that the bishops in England took no part in the government or affairs of Methodists' societies. And, as to ordination, I take it, that so far as the relation of spiritual pastors is concerned, the Church of England is one throughout the world ; and the bishops in England, so far as their sacred office and apostolic character are concerned, were as capable of ordaining ministers for the purposes their members attached to the Methodist society in America, as for the purpose of the Methodists in England. Practically, and from political causes, there were difficulties in the way ; and so there were difficulties in the way of Methodist preachers in England obtaining ordination from a bishop, and difficulties which have led at length to a separation from the church in this respect, and to a renunciation of the necessity of orders direct from a bishop. Distance and the foreign relation created increased difficulties in regard to America, but faith and conscience are independent of such considerations.

I consider that Mr. Wesley recommended pretty nearly what Dr. Coke carried into effect, and that when the Conference at Baltimore accepted and allowed of the arrangement, they exercised a power which, for all that appears to us, their followers admitted them to have. And if that Conference had rejected the name of bishop, and preferred that of superintendent or president, and had required their president to be periodically changed, I can not say that there ever would have been a bishop of that church in America. After reading the history of the transaction, my belief is rather that there would not have been, and that Dr. Coke would have conformed to their views.

I do not consider that the American Methodist Connexion looked upon Mr. Wesley as inspired, or capable of giving a divine sanction to anything, but that they assented to and accepted what he had recommended, upon their application.



And as respects Wesley himself, he was too sensible and pious a person to set up any such pretension, and was so far from looking upon it as a point of conscience that Dr. Coke should receive, by the imposition of his hands, authority as a presbyter, and afterwards a bishop, that he had, it seems, no small difficulty in reconciling it to his conscience to ordain him at all, and did not, in fact, bestow upon him the name though he gave him the office of bishop.

It is clear to me that if the Methodist Society stood on the same footing at that time as to the ordaining of ministers that they do now, there would have been no such ground for imagining, in any quarter, a necessity for creating a bishop in America ; and the expedient which was suggested by circumstances only would not have been resorted to. And at last the American society, in effect, as to ordination, stands on the same footing as that in England ; for their elders or ministers are ordained by persons whose ordination has been derived in succession from Mr. Wesley, a priest in orders of the Church of England.

By admitting episcopacy in the first instance, I think the American society made a change of a more questionable character—that is, a greater innovation : they introduced a new element—that is if any particular importance is to be attached to the name of bishop ; and yet it has not been shewn that the step was taken to have dissolved the pre-existing society, or that it affected their property or threw them into any confusion : then, although they agreed to adopt it, I do not know how I can say that it was irrevocably fixed upon them.

If Wesley, while he lived, had repented (as there is some reason to think he did) of the measure, and had advised them to relinquish this new feature, or if he had sent out a new regulation, or had advised that the office of bishop should be discontinued, and that they should have instead an annual president sent out by him, and if the general conference had conformed to his wish, I cannot determine that the church or society might not have been so modified in its government without destroying it ; nor can I say that



what Mr. Wesley could have done while living could not have been done in any manner, by any authority in the society, after his death.

On the whole, episcopacy, by the constitution of the Methodist Episcopal Church, seems to be treated as a mere regulation of church government. It is not vested, that I can see, in any divine authority: considering how, and when, and under what circumstances it originated, and the reasons of convenience assigned for its introduction, it does not appear that it rested on any other footing than as a measure of church government.

It is expressly made subordinate to the General Conference. They could appoint and remove the bishop for cause; and, what is more material than all to the present question, and indeed puts an end in my mind to all question on this point, is, that by the written constitution the General Conference has, as it seems to me, authority to do away with Episcopacy. But, before I proceed directly to the main consideration, I will recapitulate that Episcopacy seems to have been grafted on Methodism in the United States only,—a country foreign to us—and it was introduced in consequence of circumstances which seem to have been thought by Wesley to render it expedient under the altered condition of things, produced by that country becoming independent of the parent state.

While Methodism was in its infancy here, it arose naturally from circumstances that it should be, as it was, connected with the Methodist Church in the United States, which happened to be Episcopal.

It was natural, as time advanced and the body here became large and respectable, that they should separate themselves from foreign connection, and should provide as they could for a mode of existence more in connection with their relation as British subjects.

They merely separated at first, and assumed to exist here as an independent community, preserving the same forms as when they composed a part of the great Methodist connexion in the United States.

But, though they retained episcopacy as a part of their constitution of church government, and retained the provi-



sion for it, they had no bishop, they ordained none, and they existed for several years in this state, having no actual bishop, foreign or of their own.

It was natural too, I think, that they should afterwards turn themselves, as they did, to the design of a union with the original stock of Methodism in England; but they were told that before they could form a part of that body they must dispense with episcopacy.

They did so, and by a proceeding such as it appears to me their constitution admitted.

In fact, episcopacy was abolished here, it seems, as it was introduced in 1784 at Baltimore—namely, by adoption or assent of the general conference, without any participation of the laity in the act—and such is the genius of Methodism. The constitution of the society, as printed in 1829, shews it in a very remarkable degree in every point. In that respect they had followed the system of Wesley. They seem never to have derived, or to profess to derive authority from the laity, but to have admitted as lay members of their body such as were willing to be bound by their rules.

In determining then, *according to their rules*, that thenceforward the office of bishop should cease, and in providing for the same functions being discharged by a president, I cannot say, on any ground that would satisfy myself, that the conference transcended their authority. The articles of their church, as I have already remarked, made no allusions to bishops, nor to the source from whence ministers are to derive their authority. The prayers used in ordination do indeed speak of the ordaining different orders of ministers in the church as an appointment of Divine Providence; but the same form, if I mistake not, is used in England in the society, where they have but ministers and lay preachers.

The conference, under the constitution of 1829, which is advanced in argument on both sides, have power to make rules and regulations for their church. The 1st restriction does not, I think, apply to this case. The 2nd and 7th, which I have cited at length in stating the case, shew that



the power of the conference was assumed to be very extensive, or such restrictions would have been needless, and the checks of Annual and Quarterly Conferences would not have been provided. The whole reading of the 7th restriction shews the meaning to be that the 2nd restriction may be done away with the consent of the Annual Conference; and I conceive that to have been intended.

If it were not for the express exceptions of the 6th and 7th restrictions, it might seem to have been intended that the power of altering should extend to the 7th section, and to that only, in the conclusion of which exception this proviso appears. But it is quite clear from the exception of those two restrictions, (the 6th and 7th,) that to those two it does not extend, while to all others, including *the 2nd*, we cannot deny that it does. Then, as to the argument urged upon us, that the words "*suffice to alter*" do not give permission to annul or go past the restriction altogether, I see nothing in it that I could satisfactorily rest upon, for that restriction is made to protect two points—Episcopacy and Itinerancy—the latter, I imagine, being of much more vital importance in Methodism, in the eyes of its followers, than the former: I mean, than the name or express office of bishop; for the functions of bishop are provided for in the new constitution, as they are in the society in England.

Now, when the conference, under a power to alter this restriction, maintains part of it in force, (itinerancy,) and annul the other part, they do, strictly speaking, *alter* the restriction rather than abolish it, and so they are within the letter. But I should, at any rate, feel it unsafe to hang a decision upon such a distinction as that, because I am persuaded that the word "*alter*" as there used was intended to extend to the doing away the restriction—or, in other words, to alter the footing on which things were placed by that restriction.

The first General Conference was to be holden in 1830, as declared in the printed "Discipline" of 1829. It is not denied that it did then assemble, with all the rights and powers ascribed to it by the "Discipline," and with the



general acquiescence of the Methodist Episcopal Church ; the fair presumption is that it did, and the rules of the society, as contained in the "Discipline," are directed by it to be read once a year in every congregation, and once a year in every society ; so that whatever the constitution, as printed in 1829, does authorize and require, must be taken to be very well known to the society at large, and to be binding upon them, for anything that has been shewn to the contrary.

With respect to the other changes which the new arrangements have effected in the society, I have enumerated them all, or all that are material, and there is none of them which I can say it was not competent to the governing power of the church to make.

The most material are those which provide for the discharge of the duties which were incumbent upon the bishop. If they could relinquish the particular office of bishop, then such provisions were necessary, and they are closely similar to those observed in the parent society in England.

Then, as to the union with the British society, I see nothing in it beyond an arrangement of church government interesting to the ruling powers of the church, but not directly affecting the interests of the laity. I conceive the body to have been always Wesleyan Methodists ; for surely the accepting a regulation for their government at the hands of Wesley himself, while they retained his doctrines and discipline, could not make them aliens to the parent society. The union makes the conformity perfect which before prevailed in the main.

It rendered unnecessary a general conference here, and that therefore is dropped, while a conference is composed like the Annual Conference under the former discipline, which is to meet yearly, and which with the president, who supplies the place of bishop, has the powers and is to discharge the duties of the former General and Annual Conferences, except in certain points in which changes have been made.

It is, on these grounds, my opinion that the change which was made in the government of this society in 1832 could



be accomplished by those who attempted it. And upon the second point I cannot say that they did not make the change effectually—that is, regularly. They seem to me to have proceeded as the “Discipline” points out; no exception appears from the judge’s notes to have been urged at the trial, except that the power of the conference to relinquish or abolish episcopacy by any proceeding was absolutely denied; and the argument last term turned upon that point. The Annual Conference seems to have met at a time and place properly appointed.

With respect to corporations, whose proceedings are under strict legal control, it has been repeatedly said that no special business can be taken up, such as the removal of an officer &c., unless all have been summoned for the special purpose who have a right to attend. If it had been objected at the trial that this principle had not been observed by the conference, it might have been held necessary for the other party to shew that it was, but no objection on that score seems to have been urged; and, for all that appears, there may have been no pretence for it. The measure was resisted on a broader ground. However, I am not prepared to say that such an objection could have been fatal in the absence of any proof of intended concealment or surprise. Much would have depended on the practice commonly pursued in this voluntary association. The regulation is one of church government in a society in which the laity have never participated in acts of legislation or control, and none who are affected by the proceedings of the meeting, or who might have shared in these proceedings, have complained, so far as it is shewn to us, that it was irregularly convened.

With respect to the General Conference—its legislative and administrative powers are so extensive, that it is highly proper that notice of any special meeting, and the object of it, should be given to each member. I do not find it stated that notice was not given; and, if such an objection had been urged, it might possibly have been shewn that it was given, though the short time between the call and the meeting seems hardly to have admitted of it, unless the



elders, being previously made acquainted with the proposition, had voluntarily assembled in expectation of it. If there was ground for objecting on this score, the objection should have been raised, and the facts would have been known to us. I see nothing on this subject in the notes of the evidence. It seems not to be desired by the Methodist regulations that all the elders should in general attend the conference, from the inconveniences which it would occasion if all were absent from their congregations; but this call was for a purpose so special and important, that all should have had it in their power to attend if they pleased.

It is to be observed however, that many months after this, and after the resolutions had been published and the whole matter had become well known throughout the connexion, the next General Conference, in October 1833, which I infer from the evidence was assembled in the ordinary manner, confirmed the same resolutions and completed the arrangements.

Nothing is shewn that impeaches the regularity of proceeding, whatever the facts may have been; and if an objection of this kind were supported by the facts proved, or by the want of proof on the other side after an objection taken, it would still require to be well considered whether upon an objection raised in this action, and after this lapse of time—not by any person immediately affected by what was done there, and not by any person who complains that his right to attend was rendered nugatory by want of notice—we ought not to say “*Fieri non debuit, sed factum valet*,” rather than to break up a system of government which has been now for some time acquiesced in, and acted upon by many thousands of persons, and in many distinct and numerous congregations.

As the case stands, and upon the facts before us, I conceive the acts of the conference cannot be impeached upon a suggestion made by ourselves of a possible irregularity. Moreover, if the proceedings for relinquishing episcopacy were wholly void on any such ground, then episcopacy has not been effectually relinquished, and a new church has not been created, and what consequences should follow the ineffectual attempt might open another question.



The last point of the case is that to which legal principle can be more closely applied.

Admitting that it was competent to the governing body in this Methodist society to relinquish episcopacy, and that they have done so, and have united the society to the Wesleyan Methodists in England in such a manner as to make the arrangement binding, then this question presents itself—Did there exist after this change a Methodist Episcopal Church in Canada capable of being governed under the “Discipline” of 1829? or, was not that body transformed into the Wesleyan Methodist Church in Canada, and so transformed that it carried with it its original rights, particularly the right of property in its meeting houses, burying grounds, &c., being sufficiently identical in substance with the Methodist Episcopal Church in Canada to have a continued existence, though in an altered form? so that a member of a Methodist Episcopal Church in Canada, unless he refuse to conform, would become of course a member of the Wesleyan Methodist Church in Canada; and this opens the consideration, “how this change and its consequences have operated upon the legal estate, assured by the deed before us, allowing the provisions of the deed their proper effect?”

It appears to me perfectly clear, that if the change made in the government of the society was made by a competent authority, and in a proper manner, the church could not be dissolved or destroyed by it. It would be the same religious community under another name, and under other government; and those who dissented, and attempted in opposition to the constitution to keep up the old order of things, would cease to belong to the society.

The change, to be sure, was such as rendered part of the former name—viz., “*episcopal*”—inapplicable, and therefore the name also was changed; but you may have the substance under different forms, and under different names, and sufficient may be left of the former substance to preserve its identity. We have instances of these changes of name in cases of individuals, of divisions of territory, of corporate bodies, &c.; but it is clearly not correct to say,



that because the name is different, therefore what was formerly known by that name no longer remains, and can no longer preserve that relation which had existed between it and another object.

It seems absurd to cite authority for anything so evident. An illustration of the principle, however, may be drawn from what is admitted to be law in the intercourse among nations—(*Grotius de Jure Belli et Pacis*, book 2, ch. 16, sec. 16), when the form of government has been changed.

In a case of 21 Ed. IV. pl. 59, referred to in Viner's *Abr. Corporation E.*, it is stated, "the king may incorporate a town by one name and after by another name, and then they shall use their name according to the second incorporation, and yet they shall continue the possession they had before by another name." The *Mayor of Carlisle v. Blamire*, 8 East. 487, is a similar case, and such instances are common. Indeed, the maxim of law is "*nomina mutabilia, res autem immobiles sunt.*"—6 Co. 66.

If the original name had been adopted from some quality or peculiarity of the society, merely formal and comparatively insignificant, the relinquishing such form and changing the name in consequence, would clearly not have sunk the existence of the body. Then, in point of legal effect, the comparative importance of the change must be immaterial, so long as it is a change which can legally be made. It is true that episcopacy was an important characteristic of the church; but, however important, still the governing power of the church had authority to make it, and to provide otherwise for the duties which the bishop had discharged—then their doing this could not dissolve the society. That would involve a direct contradiction; it would be to say at the same moment that the change could be made and could not be made. When it is once granted that it could be made, it must follow that the society in which it is made must be bound by it; and the members who refuse to conform must, for this as well as for nonconformity on any other ground, be held to set themselves against the society; and if refusing to accede they so decidedly abandon the society that we must say they have ceased to be members, we



must say so in such a case as well as in any other. Doubtless the consciences of individuals are not to be forced, and they have the option to withdraw; but individual members cannot under cover of the old name set up an imaginary body when the substance is gone; and because they choose to say they will exist as a society under the old name, claim on that ground to have the property which had been held by the society before their name was changed.

But the plaintiffs rely on the effect of the provisions contained in the deed. I have already set these out and I need not repeat them. Though as a court of law we must look attentively at the declaration of the trust in this case, not for the purpose of seeing whether the trustees are doing right or attempting to do wrong—that would be a question which should engage the investigation of a court of equity—but for the purpose of deciding who are the persons that now hold the legal estate.

We know what nine persons took the estate under the trust deed. It is urged by the plaintiffs that seven of these (all, except Grass and Powley,) have *ceased to hold* any interest in the premises. If that be true, then the defendant can set up no legal title *under them* to the possession; and he pretends to set up no other. The deed says, “If any of the grantees *cease to be members of the Methodist Episcopal Church in Canada, according to the rules and discipline of the said church,*” then they shall cease to be trustees, and successors shall be appointed. The statute, I think, confirms and renders effectual this provision, and we must see that it shall prevail according to the intention of the deed. It is not pretended that all these seven trustees have individually withdrawn from the Methodist Episcopal Church, as under ordinary circumstances any member might do, but it is contended that the same effect has been produced by their going with the conference after the change.

If the change left no Episcopal Church remaining, (which indeed the plaintiffs do not seem to contend, but rather the contrary,) then no body could be a member of that church in 1835, and so there could be no trustees, and the plaintiffs consequently could have no right to recover



possession. But they say, after what took place in 1833 there was left the Episcopal Church still remaining, though without regular conferences, of which church the seven trustees *ceased to be members*.

There again the argument for the plaintiffs fails, I think, in attaching all the importance to the term "episcopal." We must look at the reason of the thing—at the circumstances and intention of the trust. We must construe it as near to the intention of the maker as may be.—Ca. Chy. 125; Com. Digt., Chancery 4, W. 13.

In an ordinary case of a bequest or donation to trustees for the use of a congregation of a particular sect, if a portion of that congregation—no matter how large a portion—abandon the distinguishing doctrines of their sect, the trustees are not to hold the church or other property for *their* use, but for the use of those for whom the gift was intended, however small a minority; and the chancellor will see that the trust is carried into execution accordingly, and will restrain the trustees from bringing actions of ejectment (though they have the legal title) to dispossess those who are entitled to the use of it.—Doe ex dem. Dupleix et al. v. Roe, 1 Anstruther 86, 265; Foley v. Wontner, 2 Jac. & Walker 247.

But we must be careful not to confound things. Here is no evidence of a donation by Ferris, the grantor, as an endowment of the Methodist Episcopal Church; nothing by which we can infer that he was moved by a preference for that particular form of Methodism. If a motive of that kind had entered into the grant or sale, then a court of equity at least would say, "you shall not pervert the gift against the intention of the giver." All we know here is, that for a consideration of 3*l*. Ferris conveys an acre of land in the township of Kingston to the Methodist society then existing there, giving to the society its appropriate name. We have no good ground for saying that he intended anything more than to sell the acre of land, and to give a deed in such form as the persons interested wished to take. And if instead of selling he gave it to them in that spirit the effect would be the same, unless it appeared to us that



the terms of the trust were of his appointment rather than of the Methodist society's, and that they indicated his resolution that Episcopal Methodists and none others should enjoy the land.

Now, it is clear to me that the truth of the case is otherwise. The Methodist society, as it then existed, were really the creators of this trust. It is well known what importance Wesley in the first instance, and the conferences afterwards, always attached to the securing the tenure of their chapels and meeting-houses by proper conveyances.

In the Methodist "Discipline" of 1829 rules are laid down for this; and it is expressly "directed that no person shall be eligible as a trustee of any of our houses, churches, or schools, *who is not a regular member of our church.*" Then, under the head of their "temporal economy," they prescribe in 1829 the very form of conveyance verbatim which was used in making this deed in 1832.

Who can fail, then, to see that the form of this declaration of trust was devised by the governing power in that society, in order to carry out the principle of this short rule; and that it was to suit the purposes and intentions of the society, and not any wish of the grantor, that these words were used? It is a maxim in equity that a trust shall be decreed according to the *intention* of the party, though the *words* may import a different construction.—Com. Dig., Chancery 4, W. 13. The clear intention here was for the use of the existing Methodist Church or society, under whatever changes it might be compelled to undergo, by the inherent authority of those to whom its government was committed. The words in the deed—"for the use of the members of the Methodist Episcopal Church in Canada, according to the rules and discipline which now are or hereafter may be adopted by the general and annual conferences of the said church in Canada," speak plainly, I think, that the intention was so to settle this property as that the use of it should accompany the Methodist Episcopal Church in Canada through all the modifications it might undergo; and if I am right in thus reviewing it, then it would be a singular construction to hold that because a



change was legally made which occasioned the term Episcopal to be disused, the society, though it still existed, must lose its property.

The trustees who are alleged to have left the society may truly say : " We are not now members of the Methodist Episcopal Church in Canada, because there is no longer a church under that name ; but we are members of the religious society for whose use that deed was given ; and, although they have adopted a change in their government which makes them no longer episcopal, yet the church exists in another name, because they could regularly make that change."

When trusts affect the public good, it is said they shall be liberally expounded for the public benefit and convenience.—2 Vernon, 431. Now, if, because the church is no longer episcopal, the society who took this conveyance must, under a literal construction of the trust, contrary to the evident intent, lose the possession of the church or burying-ground, so it is probable they must or may lose the possession of every church which has been conveyed to their use ; and the same literal construction of the rest of the deed would reserve these for the use of preachers belonging only to a denomination which, it appears to me, no longer exists as a society in the province, according to the effect of the only constitution under which it is shewn they can be governed. It is for the public good to prevent this confusion, by going all reasonable lengths in supporting the acts of this constituted body, if they comply with the forms of this constitution, and do not trespass upon conscience.

For the reasons which I have given, I think it consistent with the deed to hold the seven grantees in question to be still trustees : and I must further observe, that if the plaintiffs were admitted to have right on their side in contending that the seven have ceased to be trustees because they have acquiesced in the proceedings of the Conference, and have submitted to the new order of things (and nothing more than this is shown), I am not sure but we should have to hold by the same rule that there are no trustees at all, and



consequently no one entitled to hold possession in the capacity ; for, as I understand the evidence, it is positively sworn that the other two, Grass and Powley, conformed for a time, outwardly at least, and remained in the society for many months after the change. If that were so, we can draw no distinction between them and the others, according to the length of time for which they respectively conformed ; for the legal estate would not leave them, and return to them when they changed their course.

On the whole, upon the best judgment I have been able to form, the defendant was entitled to a verdict at the trial. If I had felt entire confidence in coming to this conclusion, I might have been contented with stating my opinion at much less length ; but the points are so various, and turn upon circumstances with which courts of law are so little familiar, that I have thought it due to both sides of the question to explain the grounds on which my opinion is founded.

SHERWOOD, J.—This action is brought to recover the possession of one acre of ground in the township of Kingston, in the Midland district, which was conveyed by one Ferris to the lessors of the plaintiff and others in fee, as “The Trustees of the Methodist Episcopal Church in the township of Kingston, for a site of a church and burying-ground for the use of the members of the Methodist Episcopal Church in Canada.” The deed was executed on the 9th day of August 1832, at Kingston, whereby the said Ferris, “for the consideration of 3*l*. of lawful money of Upper Canada, did give, grant, bargain, sell, assign, release, convey and confirm to the said trustees the acre of land in question ; to have and to hold to the said trustees and their successors for ever, for the use of the members of the Methodist Episcopal Church in Canada, *according to the rules and discipline which now are or hereafter may be adopted by the General or Annual Conference of the said Church in Canada*, in trust and confidence that they the said trustees for the time being shall at all times thereafter permit any Methodist Episcopal minister or preacher, he being a member of the Methodist Episcopal Church in



Canada, and duly authorized as such by the General or Annual Conference, to preach and perform religious service in the said house and burying-ground according to the rules and discipline of the said Church." The deed then provides the manner in which the succession of each trustee shall be appointed, and limits this election of each successor to the members of that church exclusively; and expressly directs that when a trustee *ceases to be a member of the Methodist Episcopal Church in Canada* he shall then cease to be a trustee. This deed was intended to be made conformable to the provisions of the provincial statute 9 Geo. IV. ch. 2, entitled, "An act for the relief of the religious societies therein mentioned," the preamble of which is in the following terms: "Whereas religious societies of various denominations of Christians find difficulty in securing the title of land requisite for the site of a church, meeting-house or chapel, or burying-ground, for want of a corporate capacity to take and hold the same in perpetual succession; and whereas it is expedient to provide some adequate relief in such cases;" the statute then enacts, "that whenever any religious congregation or society of Presbyterians, Lutherans, Calvinists, Methodists, Congregationalists, Independents and Baptists, Quakers, Menonists, Tunkers or Moravians, shall have occasion to take a conveyance of land for any of the uses aforesaid, it shall and may be lawful for them to appoint trustees, to whom and their successors, to be appointed *in such manner as specified in the deed*, the land requisite for all or any of the purposes aforesaid may be conveyed; and such trustees and their successors in perpetual succession, by the name expressed in such deed, shall be capable of taking, holding and possessing such land, and of commencing and maintaining any action or actions in law or equity for the protection thereof, and of their right thereto."

The execution and registry of the deed according to law were proved at the trial, and it was also shewn that two or more of the lessors of the plaintiff were mentioned in the deed as the grantees of Ferris. The plaintiff therefore made out a *prima facie* case, sufficient to entitle him to recover



in this action, unless there is something in the evidence on the part of defendant to do away the apparent legal right on the other side. Before I proceed to examine the objections of the defendant, I will state what I conceive to be the point on which this action must ultimately turn, which is this: In whom is the legal estate vested?

Another important inquiry may at some future period be instituted—namely, whether the legal owners have duly executed the trust reposed in them by the grantor for the proper use and benefit of those who were entitled to the beneficial interest of the estate; but that is a matter exclusively within the jurisdiction of an equitable forum, where the trust estate is recognised and protected to the full extent of the protection afforded to the legal estate in a court of law. The object of a trust may sometimes change by a change of circumstances; but the legal estate, in my opinion, must exist in strict conformity with the principles of its original formation if it exists at all; and the party clothed with the legal estate can recover at law even against the party himself, who is entitled to the equitable estate.—8 T. R. 118; 5 East. 138; 11 East. 334. If the trustees are grantees by the deed, the terms of the instrument must determine what estate they have.—8 East. 248. When the grant is made to trustees and their successors as a corporate body, and it becomes impossible to appoint successors according to the terms of the charter or of the instrument under the authority of which successors are to be appointed, then the body politic is necessarily dissolved, which dissolution is the civil death of the corporation itself; and in that case their lands and tenements would revert to the person who granted them, or to his heirs, because the law annexes an implied condition to every grant of this kind, that if the corporation be dissolved the grantor shall have the lands again.—Cok. Lit. 13, B.; Gotbolt, 211; Moore, 283. The grant is only during the life of the corporate body, which, it is true, may last for ever, and is put an end to by the actual dissolution of the corporation: the grantor takes it back by reversion, as in the case of every other grant for life.—1 Blk. Com. 484. If land be conveyed to an individual in his natural



capacity as trustee for another person, and the *cestui que trust* dies without heirs, the trustee shall hold the land for the benefit of himself, and it shall not escheat to the king or lord-paramount for want of an heir of the *cestui que trust*, as in Wheate ats. Burgess, 1 Blk. Rep. 123, where the whole question is elaborately discussed. It is very different in principle where the land is granted to a corporation, as I have already shewn.

The trustees in this case could not have been made a body corporate under the principles of the common law, for the purpose of holding the fee simple of any real estates for the use of others.—Plow. 102, 538. But the power of giving existence to this corporate body as it now is, originates entirely in our provincial statute. All corporations are mere creatures of the law, established for specific and special purposes, and derive all their powers when formed by statute from the act which creates them; and consequently it is incumbent on them to show their authority for acting, and always to limit their acts to the exact rule, manner and subject matter prescribed to them by the law.—3 Bar. & Al. 12; 3 Bar. & Adol. 284.

The statute 9 Geo. IV. ch. 2, empowers the religious societies or congregations of Christians therein enumerated to purchase and hold in fee a quantity of land not exceeding five acres, to be held for the chapel or church and for a burying-ground; and to enable them to secure to the society the benefits and advantages contemplated by the legislature, the act gives them the following powers: first, to appoint trustees, to whom and to whose successors the lands are allowed to be conveyed in fee; secondly, to accept the delivery of a deed, in which the name of the corporate body is to be expressed, and by which it is thereafter to be known and designated; thirdly, to settle with the grantor who are to be the first trustees, and the manner or mode of appointing their successors, and to cause the same to be set out at large in the deed of conveyance; fourthly, to institute and carry on suits at law and in equity by the name expressed in the deed. The deed seems intended by the statute to be a *quasi* charter, and to serve as a land-mark to



the body corporate for their guidance in the performance of all those acts which are necessary to perpetuate their existence. No successor can legally be appointed to the first trustees in any other manner than that which is specified in the deed, and therefore the legal estate can vest in no other. The provisions of the deed on this head are very explicit, and clearly state who is to nominate the successors, and from what description of persons they are to be selected. And here I will observe that the whole scope and bearing of the instrument is exclusive in its nature and phraseology, and shews a fixed intention to place the legal estate in the hands of the members of the Methodist Episcopal Church alone. I think no words in our language could have been chosen to express the intention of the parties with greater judgment.

It is a rule in law that the plaintiff must recover in ejectment upon the strength of his own title, and cannot found his claim on the weakness of the defendant's title; for mere possession gives the defendant a right against every man who cannot show a legal title. The party who seeks to turn another out of possession for the purpose of gaining it for himself, must first establish a legal right; and therefore, when it is shown by the defendant that the legal estate is not in the plaintiff, but in some third person, then the plaintiff cannot recover. This is the general rule of law, to which indeed there are some exceptions, but they are inapplicable to this case.

The defendant professes to be a member of the Wesleyan Methodist Church, and belongs to a congregation in the town of Kingston, wholly composed of persons of that description. The minister of that congregation nominated a certain number of trustees, who were appointed by some of the trustees named in the deed, which latter ceased to be Episcopal Methodists and became Wesleyan Methodists after they were first appointed by the parties to the deed. The trustees of the Wesleyan Methodist congregation put the defendant into possession of the premises, to hold for the use of the Wesleyan Methodists, in exclusion of the Episcopal Methodists. A change from one religious de-



nomination to that of another by a greater part of the first congregation, is the origin of the present suit. It appears by the evidence on the part of the defence, that the General Conference of the Methodist Episcopal Church in Canada met at Hallowell, in the district of Prince Edward, on the 13th August 1832, and that three-fourths of its members adopted a resolution to relinquish Episcopacy. The members of the general conference are all ministers or teachers, and laymen are wholly excluded. After some time the resolution to abolish Episcopacy was adopted. The ministers and preachers who adopted it formed another church, called "The Methodist Wesleyan Church in Canada;" and the general conference of the newly formed church entered into certain articles of union with the Wesleyan Methodist Church in England, by which it was stipulated that the general conference in England should annually appoint one of its own members to act as president of the general conference of the Wesleyan Church in Canada. Both the Episcopal and Wesleyan Churches in Canada have written constitutions, which show the extent of the powers which are exercised by the general and annual conferences of each of them. At the trial of this cause a book was adduced in evidence, the authority of which was admitted by both parties, entitled, "The Doctrine and Discipline of the Methodist Episcopal Church in Canada," which contains the written constitution of the Church, showing the principles upon which its government is founded and conducted. In the seventeenth page of the book, under the head of the "general conference," are the following rules or regulations, establishing the manner of forming the conference, and defining its constitutional powers.

1st. The general conference shall be composed of all the travelling elders who have travelled for four full calendar months last past, and have been received into full connexion. 2dly. At all times when the general conference is met, it shall take two-thirds of its members to make a quorum for transacting business. 3dly. One of the general superintendents shall preside in the general conference; but in case no general superintendent be present, the general



conference shall choose a president *pro tempore*. 4thly. The general conference shall have full powers to make rules and regulations for our Church, under the following limitations and restrictions : first, the general conference shall not revoke, alter or change our articles of religion, nor establish any new standards or rules of doctrine contrary to our present existing and established standards of doctrine ; secondly, they shall not change or alter any part or rule of our government, so as to do away with Episcopacy or destroy the plan of our general itinerant superintendency. There are several other limitations and restrictions of the powers of the general conference, but as they do not relate to the present subject in the least, I find it unnecessary to transcribe them. After enumerating all the restrictions, the following general proviso is subjoined : “ Provided, nevertheless, that, upon the joint recommendation of three-fourths of the annual conference, then the majority of three-fourths of the general conference *shall suffice* to alter any of the *above restrictions* except the 6th and 7th, which shall not be done away or altered without the recommendation or consent of two-thirds of the quarterly conferences throughout the connection.” It seemed to be admitted throughout the course of the arguments of counsel, and also established by the nature of the testimony afforded by the constitution itself, that it had been virtually agreed to and adopted by the voluntary association of persons who style themselves “ The Methodist Episcopal Church in Canada.”

On the part of the defendant, the following grounds were taken in support of the defence : 1st. That the written constitution gave three-fourths of the general conference the power to relinquish Episcopacy on the part and behalf of all the members of the Episcopal Church, both ecclesiastical and lay. 2dly. That the resolution of the general conference did in fact relinquish Episcopacy on the part and behalf of all the members of the Church, and that the legal estate in all lands belonging to the different congregations of the relinquished Church passed to and became vested in the trustees of the congregations of the newly established Church, by such act of three-fourths of the general conference



The plaintiffs deny both conclusions, and contend that the premises warrant neither of them, and that the general conference had no authority to relinquish Episcopacy by the terms of the constitution; but if they had, still the relinquishment could not have had the effect of altering or modifying the deed or conveyance in any respect, but the legal estate in the lands remains where it was before the relinquishment occurred.

With respect to the first point—that the written constitution gave three-fourths of the general conference the power to relinquish Episcopacy on the part and behalf of all the members of the Episcopal Church, both ecclesiastical and lay:

The general conference of the Methodist Episcopal Church, by the fourth article of the written constitution, has full powers to make rules and regulations for the Church, under certain special restrictions, the second of which declares that the general conference shall not change or alter any part or rule of the established Church government in such a manner as to do away with Episcopacy. Then follows the proviso, “that upon the joint recommendation of three-fourths of the annual conference or conferences, then the majority of three-fourths of the general conference shall suffice to alter any of the above restrictions.”

Looking at the fourth article, the second restriction, and the general proviso, it plainly appears to be the intention of the whole instrument that not less than three-fourths of the annual conferences should possess the power of recommending any alteration of the written constitution, and not less than three-fourths of the general conference should have the power of making any alteration upon such recommendation. Here a preliminary question naturally presents itself to the mind—namely, in what manner did the framers of the constitution intend that alterations might be made in it? Were they to be made orally or in writing? If oral alterations were made, they would soon be forgotten and always liable to misstatement or misconstruction; but if the alterations were reduced to writing, like the constitution itself, they would become incorporated with the original



instrument, forming a part of it, and being equally valid. I conclude, therefore, that the framers of the written constitution would always intend that all alterations of it should also be written, unless specially stated to the contrary in the constitution itself. In the present case it was not proved, or even alleged, that the annual conferences ever recommended, or that the general conference ever made, any alteration, either oral or written, in the constitution. Three-fourths of them proceeded at once to relinquish Episcopacy, in face of the written constitution, and against the conscientious scruples and wishes of the other fourth part of the members of the Church. The members of the Methodist Episcopal Church in this province are still numerous, consisting of many thousand souls; and it was therefore incumbent on the general conference to proceed with caution and deliberation as well as formal correctness, in all steps towards any alteration in the original compact by which the Church was governed. The fourth part, who still profess to form the Episcopal Church, have in my opinion just cause to complain of a violation of the constitution; because I consider it still unaltered, according to the spirit and intent of the instrument.

With respect to the second point—that the resolution of the general conference did in fact relinquish Episcopacy on the part and behalf of all the members of the Church, and that the legal estate in all the lands belonging to the different congregations of the relinquished Church passed to and became vested in the trustees of the congregations of the newly established Church, by such act of three-fourths of the general conference :

The equitable estate, beneficial interest or use of the land in question, belongs to a great body of people, whether it be the right of either one or the other of the contending parties, and cannot be the subject of a suit at law. If the construction put upon the deed of conveyance from Ferris to trustees by the defendant be the correct one, then perhaps there would be an executory trust created by the deed, depending on such rules and regulations as the general conference might from time to time make after the execution of the



conveyance. If so, a court of equity might modify and direct such executory trust, according to the intention of the parties. It would form a subject peculiarly within the cognizance of a court of equity, who might decree the use of the property to whichever party appeared entitled to the beneficial interest, according to the principles established in equity; but the legal estate executed by the Statute of Uses must be vested in such trustees as are appointed according to the manner or mode of appointment expressed in the deed and authorized by the statute.

It is contended by the defendant, that the latter part of the habendum in the deed authorises an alteration or modification in the manner of appointment of trustees, to be made by the general conference as they may deem expedient, and that in effect they have made an alteration in the manner of relinquishing Episcopacy. The habendum is in the following words: "To have and to hold to the said trustees and their successors, in trust forever, for the use of the members of the Methodist Episcopal Church in Canada, *according to the rules and discipline which now are or hereafter may be adopted by the general or annual conference of the said Church in Canada; in trust and confidence that they the said trustees for the time being, shall at all times thereafter permit any Methodist Episcopal minister or teacher, being a member of the Methodist Episcopal Church in Canada, and duly authorized as such by the general or annual conference, to preach and perform religious service in the said house and burying-ground, according to the rules and discipline of the said Church.*"

The intentions of the parties to a deed should be carried into effect, so far as it can be done consistently with the rules of law. The intention should be drawn from the whole deed, taken together. The first trustees were all members of the Methodist Episcopal Church; they bought the land for the exclusive use of the members of that Church; they took care that the deed should express that their successors should be exclusively chosen from the members of that Church; they caused it to be stated in the deed that if any of the trustees or their successors should



cease to be members of the Church, they should cease to be trustees, in the same manner as if they were dead. The members of both the Episcopal Church and Wesleyan Church are all known by the name of Methodists, and both appear to have the same articles of religion and standards of doctrine in substance ; but still they both disclaim being identical, and the distinguishing difference between them is found in the different forms of church government which they have adopted. The form of one is Episcopal, the other Presbyterian. It is not important to the decision of this case, I conceive, to attempt to trace the precise line of difference between them : it is enough to know that they publicly profess to form two different sects or religious denominations of Christians. Now, it appears to me the words in the latter part of the habendum, "according to the rules and discipline which now are or hereafter may be adopted by the general or annual conference," were intended to apply to the manner of using the church and burying-ground, and the performance of religious services in them, and not to the manner of appointing successors to the first trustees. At all events, the words used could not be intended to relate to the act of relinquishing Episcopacy, because they expressly refer to that description of rules and discipline which either the general or annual conference was competent to make by the terms of the constitution, and there is nothing in that instrument to authorize the annual conference under any circumstances to relinquish Episcopacy. Besides, the act of relinquishing Episcopacy cannot properly be called a *rule* or *discipline* ; it is a decided measure of abolition. The annual conference has the general superintendence of all ministers and preachers, and might make rules respecting the manner of performing religious services in the church and burying-ground according to the written constitution ; and therefore it appears more reasonable to suppose that the words before stated were inserted in the deed to direct in what manner the church and burying-ground should be allowed by the trustees to be used, rather than to the mode or manner of appointing the successors of the first trustees.



Supposing, however, that the intention of the parties to the deed was to the effect contended for by the defendant—namely, that they intended to give the general conference the power, by virtue of the deed, of altering and modifying the manner of appointing the trustees, according to existing circumstances, and as they might deem expedient—it is my opinion that such part of the habendum would be void for uncertainty, and for being unauthorized by the words of the statute 9 Geo. IV. ch. 2. The parties to the deed are permitted by the act to specify in the conveyance the manner in which the successors to the first trustees must be appointed. The word “manner,” used by the legislature, must necessarily include both the act of selection and the description of persons from whom the selection is to be made. The deed directs that a minister or preacher of the Methodist Episcopal Church shall nominate each successor from the members of that Church alone; and whenever a trustee ceases to be a member he shall cease to be a trustee, and another trustee shall be appointed in his place from the members of the Church. All the provisions of the deed appear to me to have this object steadily in view—namely, to vest the legal estate and to continue it exclusively in the members of the Methodist Episcopal Church in Canada. One-fourth part of the original members of that Church throughout the province, and who form a large body of men, still profess to belong to the Church, and to adhere strictly to the written constitution, which forms the bond of their religious union; and it appears to me that there is as strong evidence of the existence of that Church now as there was when the deed was executed. Both parties claim under the deed, and therefore admit the existence of the Church at that time, because the deed expressly states the fact. The statute, in my opinion, does not empower the parties to the deed to delegate their authority to others to fix the manner of appointing successors to the first trustees; and I also think they themselves would not possess the power of altering the manner of such appointment, after it was once established, by executing the conveyance; and much less are they legally authorized to confer such a



power on persons who would be strangers to the deed. It would be common justice, I think, to presume that the plaintiffs and their brethren refused to join the Wesleyan Church from conscientious motives, produced by sincere doubts whether its form of government could be sustained by the authority of the scriptures or the practice of the apostles. In that case it would be altogether a matter of conscience, and the majority of the general conference should be strictly held to shew their proceedings to be regular, according to a reasonable and proper construction of the written discipline or constitution adopted by all the members of the Episcopal Church, before they are allowed to take from the latter the lands which were undoubtedly intended to be conveyed to the members of the Episcopal Church exclusively.

Upon as full a consideration as I have been able to give a case of the first impression, I am of opinion the lessors of the plaintiff have the legal estate in the premises, and are entitled to judgment on the following grounds, as well as others alluded to in the course of my remarks :

First—Being members of the Methodist Episcopal Church in Canada, they were eligible by the words of the deed to be trustees, and were legally appointed. Secondly—The statute and deed do not authorize the appointment of trustees from any other religious denomination. Thirdly—The members of the Wesleyan Church are incapable, under the statute and deed, of being appointed trustees, or of holding the legal estate. Fourthly—If they are entitled to the equitable or beneficial interest and use of the premises, they must claim their right in a court of equity. Fifthly—The written constitution has not been altered according to the words, true meaning and spirit of the instrument. Sixthly—The Methodist Episcopal Church exists as it did when the deed was executed, although its numbers are diminished. Seventhly—The legal estate must rest in the trustees, according to the terms of the statute and deed, without regard to any subsequent proceeding of the conference. Eighthly—The parties to the deed could not delegate a power to strangers to alter or modify the manner of appoint-



ing trustees, as specified in the deed, and they had no authority to alter or modify it themselves. Ninthly—When a change of circumstances renders such an alteration equitable and just, application must be made, in my opinion, to the legislature, who are alone capable of making any alteration in the manner of appointing the successors of the first trustees.

MACAULAY, J.—The first consideration is, whether this forms a proper subject for investigation in a court of law. Religious associations of the present kind, not being regular ecclesiastical establishments, are only judicially noticed in relation to their temporal interests.—3 Bur. 1268; 4 Bur. 1991; 3 T. R. 575; 7 B. & C. 314; 10 B. & C. 720, 721; 4 B. & C. 462; 6 D. & R. 524. The courts exercise jurisdiction over their property as charitable trusts, and in that way their proceedings are often subjected to legal or equitable scrutiny; and throughout this opinion, when I speak of the powers of the conferences, I wish to be understood as exclusively restricting myself to their exercise in relation to the property in question and the members of the church interested therein.

The only object here is to ascertain by whom the legal estate in the Waterloo church and premises is held, under the corporate name authorized by the statute; and if those mentioned in the deed are entitled to be regarded as trustees *de facto*, until ousted by some direct judicial proceeding, instituted with that view, the defendant should succeed, for a decided majority of them side with the defence; but if it is competent to the minority to prove that such persons have ceased to be trustees, ulterior considerations must be entertained.—1 Anstr. 86, 266; 1 Bro. 368, 369; 4 Cowan, 23; 6 East. 363, 369. In the event of death or succession, one remaining trustee would possess the estate, without regarding the regularity of succeeding appointments; but, unlike ordinary trusts, the legal interest is transmissible to successors when vacancies occur (stat. 9 Geo. IV. ch. 2); and the deed provides that the trust shall be vacated by any trustees leaving the Methodist Episcopal Church in Canada; and successors have been



nominated on both sides. It is apprehended, therefore, that in a litigation like the present, between two antagonist parties, each asserting a legal right to the trusteeship, and such right depending on membership, a court of law is incidentally obliged to decide upon the competency of the general and yearly conferences to supersede Episcopacy and accept a president from the British Connexion. There is no avowed secession by either party; all depends upon the validity of the late union, out of which this controversy has arisen. When once the legal rights of the conferences, as leading to a discovery of the present legal trustees, are determined, the jurisdiction of this court terminates. Any breach or misapplication of the trust, by those legally entitled, must be redressed in equity. A court of law deals with the legal estate; a court of equity protects the equitable interests: the one looks at the legal interest of the trustees, the other to the equitable claims of the *cestui que trust*. Each within its proper sphere confines all parties within legitimate bounds, without any arbitrary discretion belonging to either. Neither law nor equity go beyond or stop short of the deed. In this court, due effect should be allowed to its legal provisions; in chancery, to its equitable objects. Whatever the deed legally authorizes, should at law be upheld; what it warrants in relation to the trust, should in equity be respected. It would seem to follow that the question of membership might arise at law as a necessary qualification for trustees, or in equity as essential to the privileges of *cestui que trusts*; and to whatever extent the right of membership might depend upon and draw into judgment any measures of the conferences, a court of law would sustain their proceedings, if conducted in adherence to the modes and forms and within the scope and compass of their constitutional authority.

Were the legal title otherwise clear, it might then become material to look minutely into the composition of the general conferences held at Hallowell and Toronto in the years 1832 and 1833; for, being extraordinary and not regular quaternal meetings, according to the discipline, it would probably be requisite that all eligible members should have



actually attended, or at least been apprised of the time, place and objects.—1 Stra. 335, 1051; 2 Bur. 723, 34, 3, 44; 2 Lord Ray. 1358; 2 Sel. N. P. 1143; Rex v. Kynaston, 1 East. 117; 8 East. 543; 8 T. R. 356; 6 T. R. 268, 752; 5 Bur. 252; 6 D. & R. 593; 4 B. & C. 426; 7 B. & C. 696, 314; 3 T. R. 189; 2 East. 70; 12 Ea. 22, 28; 13 Ea. 385, 367; 4 B. & C. 800, 837, 842; 7 D. & R. 267; 2 Smith, 20; 6 B. & C. 456.

The vacancy in the Episcopal office, and its consequent want of actual representation on those occasions, and the admission of ineligible parties to the discussions, might likewise merit attention, as also whether the discipline ought not to have been amended by a revision of the second restriction, previous to any vote destructive of Episcopacy. But the more important inquiry, whether the conferences could, by any steps of their own, however formal, relinquish Episcopacy and substitute an annual presidency, to be supplied by the British conference, against the will of some members of the Church, attracts and demands prior notice, and more especially of such dissentients as belong to the Waterloo congregation.—4 Bur. 2260, 2521; Str. 265; 14 Ves. Jr. 13; 2 P. W. 209; Plow. 113.

In taking up the question, it is proper to direct attention to the rise, progress, doctrines and discipline of the Wesleyan Methodist Church in both England and America; not to canvass the merits or defects of practical differences, but to glean information auxiliary to the construction of doubtful rules of church government.—1 Dow. 16; 3 Mer. 412, 413. With like objects, other Christian churches, episcopal and presbyterian, should be glanced at; not to agitate theological discussions, nor to indulge a polemic spirit, but to collect rays converging to the subject under consideration. The merits of differing systems, in themselves, are not involved, and their constituent parts are only important to exhibit their distinguishing features.

I would in the first place premise, that where the discipline of 1829 speaks of "our Church" (*a*), I understand a Protestant sect, consisting of members, ecclesiastical and

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(*a*) "Discipline"—See p. 11, art 13.



lay, with certain known rites and doctrines, deeming the baptism and the Lord's supper of holy institution, and a duly ordained ministry important in their administration, although not made an express article of faith (*a*). Secondly. That by episcopacy I take to be meant a settled form of church government, under a superintending clergy, divided into a plurality of orders, and derived from scriptural authority, which I find expressly acknowledged in those parts of the discipline which prescribe the ordination services for deacons, elders and bishops (*b*). I think the term is used in an extended sense, not restrained merely to the head or president of the conferences, but indicating a government under divers clerical orders appointed for the Christian Church, of which a bishop is the principal; not a system devised merely by man's imagination as judicious or expedient, but sincerely believed to be deduced from sacred authority. Were it obscure on this subject, a perusal of the life of the eminent Wesley, and a reference to the early rise and progress of Methodism until the establishment of Episcopacy and the promulgation of the first discipline in the American Church, would illustrate its meaning according to this interpretation. Thirdly. It appears to me, too, that the name used in the discipline of 1829 denotes two things: first, that the Church is episcopal, and, secondly, that it is seated in Canada. I think the words "in Canada" at the end had a two-fold object: first, to form part of the name drawn from the locality, and, secondly, to qualify what went before; the whole importing that it was not only a Methodist Episcopal Church, but that Church in Canada, as distinct from the main body in the United States (*c*). The name "Methodist Episcopal Church in Canada," does not merely designate an isolated society of Christians, but such a society of Christians as a portion of a more extensive community of Methodist Episcopalians; and the same words in the deed of trust are capable of a similar construction.

The Wesleyan Church in England, and the Methodist Episcopal Church in America (of which the latter is now

(*a*) See "Discipline." pp. 111, 116, 128. (*b*) See *Ibid.* (*c*) See pp. 5 & 22.



the larger body), though both originating with the same distinguished founder, form two separate and distinct societies, not one connexion. It is true they harmonize in doctrine and agree in many other points of discipline ; in other respects they vary ; and the history of both should be traced in the different lives of the Rev. John Wesley, and other records of Methodism, to comprehend fully the bearings of the present controversy.

What follows will display some internal differences not immaterial, so far as this case depends upon substantial distinctions between the two communities.

The brief account of the origin of the Methodist Episcopal Church, in the beginning of the discipline (*a*) shews how Episcopacy was engrafted upon that society ; and that whatever Mr. Wesley might have in his own mind contemplated, its institution was understood and received by the members of that body in its true sense, touching both ecclesiastical government and the sacred rituals, however abridged in power and authority, or deficient in rank or distinction, the bishops may be, in comparison with the English prelates. It was that step, on Mr. Wesley's part, which was conceived to have formed a previous religious fraternity into an independent Christian Church. He had laid the foundation ; and afterwards, when the superstructure was ready, thus placed the key-stone in the arch, by which it was perfected and upheld as a Church, in contradistinction to a lay association of pious brethren. His object was to cement its union as a Christian Church by an ordained ministry (*b*), to consist of bishops, elders and deacons ; through all which orders Mr. Asbury (his former assistant and a zealous lay preacher) was in America the first to pass (*c*).

In England he did not pursue a similar course ; nor did he attempt to convert his adherents there into a separate Church, apart from the national establishment. He was a presbyter, or held priest's orders in that Church, and was sincerely attached to its ordinances. He superintended the

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(*a*) See Discipline of 1829, p. 5. (*b*) See the letters from Coke to Wesley, and from Wesley to Asbury and the American brethren. (*c*) "The Discipline," p. 5.



British societies in person while he lived, and at his death the government devolved upon the yearly conferences, by virtue of his formal *Declaration*, inrolled in chancery, executed in 1784, shortly before his ordination of Coke to the office of superintendent in America, or to the "Episcopal office," as it is termed in the Discipline. The authority of the English yearly conferences did not result from any innate right or attribute of the preachers, nor had it existed previous to this declaration, further than Mr. Wesley had been pleased to divide his power with them. History informs us that the first meeting was convened by him of his own accord, in 1744, to advise upon the affairs of the societies; and explains how the preachers gradually gained influence through increase of numbers, and the "rules of future practice" from time to time adopted, and to which all conformed as binding regulations.

The American conferences were firmest under Mr. Wesley's assistants, and became clothed with power much in the same way.

Previous to the year 1784, the *English* conference was not supposed to possess, in a collective capacity, and in relation to the Church property, any defined character cognizable in law. Much real estate (including chapels, &c.) had been conveyed to trustees, to permit Mr. Wesley, and such others as he should appoint, at all times during his life to enjoy the use thereof to preach and expound God's holy word; and after his death to permit such persons as should be appointed at the yearly conference of the people called Methodists to enjoy the premises for the purpose aforesaid; and it was in order to give legal identity to such conference that the Declaration was executed. He inserted the names of one hundred preachers, and declared that they and their successors (therein provided for) should constitute the body meant to be designated in the deeds of trust when they spoke of the conference of the people called Methodists. It was thus that the English conference first received its *quasi* corporate or collective character, and was perpetuated; and in whatever light Mr. Wesley's organization of a Church in America may be regarded, his arrangements for the



future management of the society in England have there been respected, and it is said have been allowed and maintained in chancery. This *Declaration* should be examined, for under it the society has been governed ever since his death. It shews that he dictated terms to the conference in the capacity of founder, and that with the deed of trust, it has, in relation to the trust estates, always operated like a law or charter, obligatory upon them and all the members; and so should the deed of trust in the case before us. Mr. Wesley's Declaration is yearly recognized, and forms a guide in its leading provisions, as doubtless the minutes of the conferences will testify. It will, however, be found, upon inspection, that this important document is silent on the subject of ordination and the sacred ministrations. They are not provided for, as was meditated and intended in the American Church, and the omission was no doubt designed. Herein the two, as claiming to be churches, differ materially in their organization. It is well known that many followers of the father of Methodism, on both sides of the Atlantic, were members of the Established Church, and received the sacrament from the regular clergy, and not from their own preachers, unless in holy orders: also that in England he made no effort to suppress the practice, or to dispense with the necessity; and that he only adopted another plan towards America owing to the peculiar exigencies of the occasion, as set forth in his letter to Mr. Asbury and the American brethren, when he ordained Coke and others to different offices in the ministry (a). The separation from the national Church in England was gradual, and not completed until after his death. Indeed, up to this day, there is good reason to believe the Methodist clergy in England are not required to administer the sacraments, nor are the laity obliged to accept thereof from them in their own houses of worship, unless both parties are willing: it is left to voluntary choice, and any reluctance on either side warrants forbearance. It is said that in Ireland a serious division and estrangement ensued upon the conference sanctioning the distribution of the Lord's

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(a) See his letter of the 10th September 1784, in Mon's life.



supper in their own meeting-houses and by their own preachers, although only extended to such as should be willingly disposed to receive the same, it being considered an innovation upon the principles of primitive Methodism (*a*).

If so, such circumstances evince the delicacy of the change proposed here, and suggest the conscientious hesitation that may be felt by the present adherents to Episcopacy in concurring in what they may deem an objectionable relaxation in a matter of spiritual concern.

It has been contended that Mr. Wesley's mode of appointing lay preachers was equivalent to ordination; yet the Episcopal Discipline (*b*) preserves a marked distinction between lay preachers and those solemnly ordained to the ministry by imposition of hands under the superintendents dedicated by Mr. Wesley to the Episcopal office in America, and the succeeding bishops (*c*).

In the present discipline and distribution of power, the Methodist Episcopal Church in America is not unlike the Moravians and some others, in which the Episcopal office and the Episcopal ordination is deemed necessary (*d*). No elevation of rank or pre-eminent authority is allowed, the bishop being governed by synods or conferences, at which he presides, and to which, as an ecclesiastical forum, *he* is *personally* amenable, although the office itself is not subject (*e*). Now the society in this province is a scion of the Methodist Episcopal Church; and, previous to the separation in 1828, it was already an organized religious body, served by ordained ministers, who received whatever sacred or ecclesiastical authority they possessed from that source. It was as a component part of that Church that the separation took place; it was by a conference of such preachers that the discipline of 1829 was prepared for the Church in Canada; and upon assuming an independent attitude, it could not be reasonably supposed that the local conferences in Upper Canada enjoyed any higher powers in their

(*a*) Ward's *Miniature of Methodism*; London, 1829; pp. 22, 23, 66, 67.

(*b*) See pp. 59, 62, 63.

(*c*) Acts, xiii. 3, vi. 6, xiv. 23; 1 Tim. iv. 14; 2 Tim. i. 6; Gal. i. 1-11; Deut. 34.

(*d*) 3 Adams's *Religious World Displayed*, p. 301.

(*e*) 2 Atkyns, 658.



Church than belonged to the general and yearly conferences in the United States over the principal establishments, although they might fairly lay claim to an equal authority ; and, since their printed discipline was manifestly based upon the one which must have long obtained in the parent society, the prerogatives of the two may be justly assimilated ; so that this case, in effect, includes the question, whether the American general conference could abolish Episcopacy throughout the whole connexion, and reduce the Church to a Presbyterian rule, without affecting the right of property, however disapproved of by the lay members. It might be further asked, whether that body could, in addition, and though resisted by the laity, accept a yearly president with episcopal powers of ordination from the British Connexion ? Politically, reasons might operate against such a measure in the United States that would weigh in the opposite scale here ; but it is not a political question, and mere expediency could not determine the right.

The disciplines of both are equally comprehensive. The general conferences are alike empowered to make rules and regulations, subject to similar restrictions, and the same proviso touching the articles and doctrines of the Church and Episcopacy, and the general itinerant superintendency. They are equally entitled to accept a superintendent from without, or to make internal changes within. I therefore consider the conferences in both countries of equal authority over their respective churches, and have not failed to reflect how the same question would be probably viewed in the American courts, should it arise there in a parallel case.

In the hope that the above represents, not inaccurately, the subsisting relations between the two great branches of the Wesleyan Methodists, and the comparative positions of the American and Canadian Churches, I approach more nearly to the consideration of the governing powers of the conferences. These powers must accrue to them from some of the following sources : First. From the original or inherent right of the clergy to exercise unlimited juris-



diction over the affairs of their Churches, ecclesiastical and temporal, without participation or constraint on the part of the laity; or, secondly, as select bodies, appointed in the first creation of their society to govern and manage its affairs as a quasi corporation, not elected by the lay members, but established in the original foundation, or gradually invested with general legislative and executive authority; or, thirdly, as placed over a voluntary religious association to rule under a settled constitution, prescribed by the founder, confirmed by usage, or adopted by the connexion in the nature of an accepted charter.

But on whatever footing placed, the powers of the conferences must be inherent or conferred; and if conferred, they must have been implanted in the first organization of the society in America, or have sprung from subsequent usage under tacit consent, or have been for the first time imparted by the discipline ultimately published; and in tracing out their privileges, the original foundation, the known usages, the acknowledged discipline, and the deed of trust, must all be taken into view, as together embracing and explaining the constitution.

First. Rested upon the basis of inherent right, the early history of the Christian Church, the councils, synods, edicts, canons, &c., would be referred to; yet I believe that by the law and constitution of England since the Reformation, the clergy of the Established Church in convocation are not admitted to possess inherent power to make alterations in fundamental points binding, *proprio vigore*, upon the laity or the property, without the sanction of parliament; and cogent reasons would withhold from the clergy of dissenting societies a more arbitrary discretion, unless explicitly accorded to them in their domestic archives.—2 Atk. 657, 659; Hardw. 57, 358; 2 Stra. 1086; 1 Kel. 143.

As respects their temporal concerns, it would seem just that between the ecclesiastical governing power and the lay members, their proceedings should be regulated by some fixed and stable rules, in common with other religious societies equally entitled to exemption from secular restraint. If the Establishments need parliamentary approval, dis-



senting congregations require the approbation of the laws operating on vested rights.

Secondly. To whatever extent the constitution of any such society expressly commissions the governing power, it may freely legislate, when obscure legal data must form its land-marks; and it appears to me that the authority claimed by the general and yearly conferences on this occasion must be searched for, not in primitive recesses, but in the rules and registers of their own Church. They are select bodies, to which the government of a religious community is entrusted, under a constitution partly written and partly unwritten. Its written depositaries are the minutes of the conferences and the discipline, to which (as the foundation of our jurisdiction) may be added the deed of trust. Its unwritten evidences repose in those early and first principles on which the society was formed and the discipline founded; and the present object is to ascertain the true spirit and intent of such discipline, as unfolding the constitution and pointing out the jurisdiction of the conferences. The discipline may be treated as principally recording what already existed, though partly introductory of new regulations; for it was prepared for the use of an association previously organized, and its object seems to have been to reduce into digested form and adapt to local use the articles and rules of government already subsisting in the mother Church, and intended to be continued in this after its amicable separation, rather than concoct a new code.

Being apparently acquiesced in by the members of the Church, it should be treated as having received their general approval. I do not know that it ought to be looked upon precisely in the nature of a subscribed document, though I am disposed so to treat it for the present, especially whenever it affirmatively introduces new regulations, or positively recognizes old ones. This case, however, depends much upon the construction of doubtful passages, not original in the Canadian discipline, but transformed from the American edition when revised for the use of the Church in this province, and in which they must have



existed for a long series of years. Their early date in the Methodist Episcopal Church may be inferred from the mention of superintendents instead of bishops (*a*).

In distinguishing between what is inserted as already in force, and that which is adopted *ab origine*, it is at the same time proper also to notice those regulations of internal economy which are *embraced*, and those prominent features which are *omitted*. We do not perceive it laid down as rules that Episcopacy should prevail, that there should be three clerical orders, or that there should be yearly or general conferences: all these, and much more, are assumed; they existed as fundamentals, and formed the substance of the discipline. This system, in its main pillars, was already established, and provision was only wanted for completing and giving symmetry to its interior divisions. It must have been by the head conference of the infant Canadian Church that the discipline was prepared; and they have already had full power to make rules and regulations before the discipline existed; at least, they must have assumed upon some previous footing whatever authority they undertook to transfer to others (*nemo potest plus juris in alium transferre quam ipse habet*), for they spontaneously drew up and published it as within their province, and recommended it to their brethren. After briefly noticing the rise of Methodism and the origin of the Methodist Episcopal Church, and inserting the articles of religion, they treat of the future conference, first asking what are the regulations and powers belonging to the general conference, taking it for granted there was to be one possessed of power, but subject to regulations. The three important topics are contained in the answer: first, the affirmative or enabling clause, declaring that they should have full power to make rules and regulations for the Church, under certain restrictions; secondly, the two first restrictions, prohibiting their changing or altering the articles or doctrines of the Church, or any part or rule of their government, so as to do away Episcopacy; and, thirdly, the proviso, that nevertheless the two conferences

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(*a*) See "Discipline," pp. 17-20.



in conjunction should *suffice* to *alter* any of a series of restrictions, including the first and second. The restriction and proviso do not say in express terms that they might do away Episcopacy, nor does the enabling clause: it is said to be inferrible from the three construed together. But, in the first place, did the power to dispense with Episcopacy exist *a priore* in the conference which compiled the discipline, or would it have resulted to the general conference unless restrained, either, first, from general principles, or, secondly, from the enabling clause? First. The conferences are not elected bodies, representing their societies; they were set over them by their founder, or the order of events they were submitted to; and, without stopping to inquire to what degree the original founder might have remodelled the constitution which he had designed, after once setting it in motion, I am persuaded that no select body in the situation of these conferences will be found entitled to a higher or more unrestrained discretion than a representative institution; and that, whether regarded in a representative capacity or as the original focus of power, they will be circumscribed by constitutional bounds, beyond which they cannot legally pass. I take it to be a rule of corporate governments, that whether vested in select bodies, or in the members at large, or in delegated representatives of the latter, such bodies, while they enjoy an inherent or implied right to make by-laws, cannot transgress those limits which their constitutions, soundly expounded, expressly or constructively assign. The trust is supposed to be accepted on the one side and yielded upon the other, upon this mutual understanding; and any such select body would be especially inadequate to subvert the constitution, or to introduce organic changes not consistent with the integrity of the structure, such as doing away a co-ordinate or component part, surrendering their own delegated powers to strangers, or adopting any suicidal act destructive of themselves as integral parts of the establishment.—4 Bur. 2519, 2204, 2260; 3 Bur. 1866, 1656; 3 Bul. 71; 4 Co. 77; 3 T. R. 199; 4 T. R. 810; 2 East. 82; 3 Ea. 215; 4 Ea. 17; 1 B. & P. 229; 4 B. & C.



799, 818. Viewing the Methodist Episcopal Church and the conferences in this light, no vital change would be admissible, not being compatible with the relative situation and duties of the latter towards the former, over which they were appointed to preside.—3 M. & S. 488.

In the instance of mere voluntary associations, acting under written articles, the rules of law would be found still more rigid and inflexible. I infer, therefore, from analogy to adjudged cases respecting corporations, and voluntary associations, that the general undefined powers of internal management allowed to administrative bodies over religious associations, should not be deemed more comprehensive than may be fairly considered incidental and necessary to the good government of the society; and I do not think the general conference can be sustained to the extent advocated, on grounds of the last kind; yet a more extensive discretion than ordinary might have been conferred by the members of the Church, through the tacit adoption of the discipline, and in this document the right claimed is supposed to be embodied. If so, it must be contained in the enabling clause; for the restriction and proviso, however they may be held to explain its meaning, do not of themselves superadd anything affirmative.—1 Co. 24-47; 4 Co. 73; Hard. 306, 344, 346; 8 Co. 145; 2 P. W. 259; Cro. Car. 83. Then, does the clause itself give, or do the restriction and proviso lend it that explanation which supports the right asserted? I believe it is a rule of construction that restrictive provisions may be inserted, from extreme caution, without actual necessity, and without implying concession, or be introduced as essential limitations to abridge undoubted power, when questionable judicial discrimination must determine the proper application. The object here is to find out the true boundaries of the enabling clause. The restriction is referred to in aid of the solution; with the same view the proviso is taken into account, and for like reasons other portions of the discipline and collateral circumstances demand attention.

In my humble opinion, there was nothing in the affirmative clause calling for the first and second restrictions. To



such extent I think the rules of law already restrained it; and had no others been imposed, it is not probable the proviso would have followed. It equally applies to several other restrictions, some of which might in progress of time be found to want modification or amendment: even those words in the second—"any part or rule of government"—might afterwards be thought to require alteration, without weakening or affecting the prohibition respecting Episcopacy. At best it does not seem to contemplate the total rescision of those restrictions; in terms it only speaks of their alteration, and distinguishes between doing away and altering. Most liberally taken, it would not do more than sanction their repeal; and if revoked, the character of restraint would be entirely lost—they would not remain altered restrictions; and, at all events, no new or affirmative law could result from their exclusion. The power of the general conference would consequently depend on the enabling clause, explained by the restriction and proviso, but in connexion with the rest of the discipline and the tenets of the Church. The members of the early conference in the United States, which composed the first discipline in the Methodist Episcopal Church, not being professional men, and doubting the effect of the empowering clause, may to some necessary restraint have added others that the law would have raised, and the proviso may have been extended inadvertently to the whole, or in the belief that no further conference would be more disposed than themselves to disturb the settled order of the Church. The word "suffice" in this proviso is a little remarkable.

Taking into view the whole discipline, and not treating it as delusive in many grave particulars, but attributing to those who framed it and to those who adopted it religious sincerity in the premises, I cannot collect that the real spirit and intention of the enabling clause sanctioned the relinquishment of Episcopacy as comprehended within the rules and regulations for the Church thereby authorized to be made. It does not appear to me to constitute properly a rule or regulation for the Church, but a radical change in a constitutional portion of the Church itself, and incom-



patible with the principles upon which the society originally acquired the character of a Church, not only in the system of government, but in the appointments and functions of its ministry.

The admission of divers orders, to be ordained by bishops with imposition of hands, in the language set forth in the eloquent and impressive prayers for the ordination service, the general superintendency of consecrated bishops, and the scope of the disciplinary provisions throughout, appear to me to forbid the inference (*a*). I gather thence that Episcopacy may be esteemed by many members of that Church upon two grounds: first, as a judicious plan of mere Church government; secondly, as of scriptural appointment, and peculiarly important in relation to the sacred ministrations. And I cannot say that those who adhere to such system have not a legal right to be secured in the enjoyment of property obtained under it, and intended for its support.

It may be said Episcopacy is not an essential ingredient in Methodism; but the term "Methodism" does not strictly imply a Church perfect in itself; and if it does, it conveys no definite idea: an Episcopal, a Presbyterian, or a Methodist Church designates no particular sect of Christians, for several classes range under each. In the Christian Church there are various separate bodies, some differing principally in doctrine and articles of faith, others principally in matters of government and orders of ministry. So in Methodism there are several distinct societies: even the Wesleyans are subdivided, not only as between England and America, but in England alone; differing, not in doctrine, but in church government and discipline.

Wherefore, to point out any single society, some adjective quality must be used to characterize it—as, "British Wesleyan," or "Episcopal Methodists." It is evident these two branches, since Mr. Wesley's death, have grown and flourished under different circumstances. In America Episcopacy has been cherished, in England disregarded; and at present a perfect analogy does not exist between the

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(*a*) "Discipline"—22, 111, 116, 128.



two societies, or between the original founder and the succeeding conferences. Of the former it may be said that in England he formed and presided over a religious society, but that in America he formed and established a separate Christian Church; of the latter it may be predicated that of both associations he was the prime mover and overseer, but that the conferences followed under him in subordination to a system already matured and sealed by him, through his declaration in England and his ordination for America. Then it has been asserted of the Episcopal Methodists, that while they reject in terms the ministry of presbyters, they do but conform in terms to that of bishops; that Mr. Wesley himself, being but a presbyter in the Church of England, could not ordain at all, and certainly not to any order higher than his own, even admitting his power to do so much; and that he could not, by any act or ordination of his, establish the Apostolic Church in the American society. It may be so thought by Episcopalians of other Churches; Presbyterians may entertain contrary ideas. I shall not pretend to pronounce any opinion on the subject. He may not have designed introducing Episcopacy, or he may have regarded apostolic succession as a fable, or have looked upon bishops and presbyters as one order, though different offices. These are debateable points, not calling for decision here. Whatever he introduced or thought, it is certain that Mr. Coke was already a presbyter or elder in the English Church; and yet, that on his mission to America Mr. Wesley ordained him by imposition of hands to the office of *superintendent*, and at the same time with like ceremonials ordained two of the lay preachers (Messrs. Whatcoat and Vasey) to be elders in the American Church, he being assisted by other presbyters of the national establishment; and no doubt he assumed and meant to exercise the prerogative of thus perfecting the work in America in relation to the holy ordinances, in doing which we are assured that he preferred the Episcopal to any other (*a*). In the opposing sentiments of subsequent writers, touching the motives and effect of those ordinations, and their subse-

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(*a*) "Discipline"—p. 5.



quent continuance in the American connexion, it is not only safest, but on this occasion most proper, to adhere to the discipline of 1829, because it must display most satisfactorily the sense and construction of those immediately interested, touching their true character and received meaning. The material consideration is, what are the sincere and conscientious sentiments of the Episcopal Methodists themselves—what are their notions of scripture doctrines, relative to the government, ministry and ordinances of their Church? Collecting them from the discipline in evidence, we learn that they are “founded on the experience of a long series of years, and on the observations and remarks made on ancient and modern churches” (*a*); that provision was deemed necessary for divers orders of ministry, as being of divine appointment; and that the conference were fully satisfied of the validity of the Episcopal ordinations of Coke and Asbury, the two first superintendents or bishops set over them (*b*).

It is not for me to gainsay this, or to investigate all the grounds on which the supposed validity of those ordinations were rested. Whether it was deemed competent to Mr. Wesley, as the Father of Methodism and in holy orders, or as the head of an extensive religious society, which Providence had raised up under his auspices, or as a case of emergency in which a spiritual agency was believed to have hallowed the act, I know not. The members of the conference, for themselves and on behalf of their people, were satisfied of their sufficiency, and a universal acquiescence confirmed the sentiment. How deeply the minds of Episcopal Methodists may be religiously imbued on these interesting subjects, I cannot tell: it is probable a union of feeling does not prevail; indeed the recent change affords example that with many they form no matter of conscientious scruple, for numbers of learned, sincere and pious members, both clerical and lay, have not hesitated to conform to the discipline of their British brethren. Yet there are dissentients, and it is their refusal to concur that has led to this suit; and from the whole tone and contents

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(*a*) “Discipline”—p. 4. (*b*) *Ibid*—111, 116, 128.



of the discipline of 1829, I cannot refuse to them the right to entertain sincerely conscientious objections against a change which they may deem substantial, however congenial to others. Nor, upon comparing the method pursued by the English conferences in appointing to the ministry with that adopted in America, do I discover that the present yearly president can be considered (in relation to Episcopacy) an effectual substitute for the former bishops in the Canadian church. I do not understand that the English conferences ordain by the imposition of hands, in conformity with Episcopal usage, or that their appointments to the ministry are made and continued under persons sacredly invested by Mr. Wesley, as the American church deem Mr. Coke and the two elders who accompanied him to have been; or that, upon being nominated to the office of president over the Canadian society, any ordination is superadded, as in Coke's instance; although on reaching this province he is permitted to ordain candidates for the ministry here, by imposition of hands and a solemn service, assisted by brother preachers.

It is true the discipline of 1833 in the ordination service designedly or accidentally acknowledges, in the same language as that of 1829, the appointment by the Holy Spirit of divers orders of ministers in the Church of Christ; still I do not find that the British Wesleyan denomination contains more than one, likened unto elders, but styled ministers, contrary to the Episcopal discipline, which provides for three (exclusive of lay preachers), called bishops, elders and deacons, without any designated by the general term ministers. The dissentient members of the Methodist Episcopal Church may feel repugnant to such arrangement; they may not look upon the union as a mere exchange of name, but indicating a serious change in church government and the calls to the ministry; and in my construction of their discipline, I cannot deny them the right sincerely to do so on plausible grounds. The American connexion is professedly Episcopal; the British is practically Presbyterian; and whatever distinguishes the one from the other, would equally distinguish the Methodist



Episcopal Church in Canada from the British Wesleyan Church in Canada, although the difference may not be so great as necessarily to destroy the identity of a society which, being the one, had thus been transformed to the other. The identity would be preserved if the change was legally accomplished ; still it seems to me that the projected union would separate the Canada connexion from the Methodist Episcopal Church altogether, and attach it to another body. It would take from it the character of Episcopacy ; it could not at one and the same time constitute a branch of the Methodist Episcopal Church and of the British Wesleyan society, but would be translated from the one to the other ; so the members joining the one would leave the other, unless avowedly adherent to both ; and when they become dissentient among themselves, it cannot be urged that Mr. Wesley, by anything he did, established a Presbyterian Church in England any more than an Episcopal one in America.

If argued that since the American conferences accepted Coke and Asbury as bishops, they might have rejected them, and consequently may at any time dispense with their successors, it might be answered that until their arrival and recognition the Church was confessedly deficient ; that Mr. Coke and the two elders whom Mr. Wesley ordained (although there was anxiety on the subject) were not sent over as tendered by him for acceptance, in the discretion of the conference in the United States, but as appointed by him to supply the ministrations of the Church, under supposed competent ecclesiastical authority ; for the language of his historian shews that up to this period he did not consider it a Church, but that in what he devised and did it was his design to make it one, as his letter to Mr. Asbury abundantly manifests. Mr. Coke's previous letter to him will help to explain how far the imposition of hands and an Episcopal order of office were thought to be important in the eyes of the American brethren (*a*), and Mr. Coke's conduct subsequent to his arrival in America exhibits his anxiety to persuade them all of the scriptural

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(*a*) See Coke's letter, 9th Aug. 1784, in Mon's life.



authority and efficacy of Mr. Wesley's ordinations, and with which the Discipline has declared them ever since to be satisfied.

Even could the American conference have rejected Mr. Coke (which, strictly speaking, they could not, without rejecting Mr. Wesley also), it would not follow that the acceptance, once made, was not a final step, not to be retraced, or that Episcopacy would not have been eventually espoused from some other quarter.

If the conferences could not lawfully enforce the late change, in opposition to the dissentient parties, it follows that as over the Church the attempt was a nullity, and that no alteration was in fact accomplished; also, that their adherents left its pale, and became component parts of another, or else formed a new and separate society. The non-conformists would still continue in her communion, and might reorganize themselves, and fill the Church with a qualified ministry, ordained by the bishops of the parent establishment: the property, too, would remain to their use.

I consider examples drawn from revolutions in national churches inapplicable. They beg the question. On such occasions the change really takes place by adequate and paramount authority, beyond the reach of higher control, and in the eyes of the municipal law a change is made. Here the gist of the controversy is, whether any actual change has by sufficient authority been effected. If it has, all is well; if the power was wanting, the effort must prove abortive. Here the laws of the country predominate; and the right asserted being denied, is brought to a judicial test; if it existed, all are bound; if not, the Church and property remain in *statu quo*; and, although many of the members may have departed, the use would be to those who refused to follow.

It may be objected that my views would exact perfect unanimity throughout the society, to warrant the step taken with security to the property. On the other hand, it might be replied that if the conferences enjoyed the large powers claimed, a sufficient majority could not only reverse the whole system of government, but change the articles and



doctrines (for the first restriction, being removed, would admit the latter as much as the removal of the second would allow the former); and *that*, notwithstanding the dissent of the majority of the ministers and all the laity; and the property would attend the change. Such extravagant suppositions do not, in my estimation, strengthen their pretensions; for a court of law cannot speculate on the influence of moral checks. In deciding whether a power exists, its possible exercise must be contemplated.

Further: upon a close attention to the terms of the trust, it would be difficult to point out how they could be fulfilled according to the recent change, consistently with the existence of independent Methodist Episcopal Churches in Canada and in the United States. The estate is declared to be for the use of the members of the Methodist Episcopal Church in Canada, according to the rules and discipline thereof, &c.; with leave to any Methodist Episcopal preacher or minister, being a member of such Church, and duly authorized by the conference, to preach in the edifice mentioned in the deed; which would allow the admission of any Methodist Episcopal minister duly ordained in the American Methodist Episcopal Church, or of any members belonging to that connexion; all of whom would now be excluded, and those of the British Wesleyan society substituted. It is not a satisfactory reply, that the assent of the conferences, being a condition precedent, might be withheld from Episcopalians. No arbitrary refusal on their part could have been anticipated when the trust was declared. Other difficulties might arise too, should all the trustees at any after time die, or secede from a want in the Wesleyan Methodist Church in Canada of a quarterly conference, as distinguished from a quarterly meeting, according to the Discipline of 1829 (*a*), to which allusion is made in the conveyance.

After the best consideration, it is my humble opinion, as at present informed—restricting myself to the estate in question—

First. That the deed of trust does not in itself expand the

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(*a*) Pp. 26, 146.



powers of the conferences over the property beyond what the discipline recognized in the conference.

Secondly. That, touching Episcopacy, the discipline conferred no new power, either in the enabling clause of itself, or assisted and explained by the second restriction and the proviso.

Thirdly. That no power to do away Episcopacy resulted or existed in the conferences, either upon the original principles of the Church in its formation, or in their ultimate appointment over it, so as to bind the property notwithstanding the disagreement of those members opposed to its relinquishment.

Consequently, that the late arrangement was not within their authority—

First, Upon original clerical rights, under the law of England ; or,

Secondly, As a select body, intrusted with the government of a religious association, compared with corporate bodies ; or,

Thirdly, In the light of a mere voluntary society, under written articles of paying regard—

First, To the inherent rights of the conferences ;

Secondly, The original constitution of the Methodist Episcopal Church ;

Thirdly, Subsequent usages ; and,

Fourthly, The discipline and deed of trust ; and looking particularly to—

First, The empowering clause ;

Secondly, The restrictions ; and,

Thirdly, The proviso ; and construing the whole together as illustrating the meaning of those portions most material and mainly relied upon.

Consequently, that those of the trustees who dissented are entitled to recover, the Church in whose bosom they remain having undergone no organic change ; and that the others, as respects the legal title to the property in question, must be considered as having discontinued their membership and vacated the trust.

Such judicial authority as I have been enabled to con



sult, seems to me to support the conclusion at which I have arrived.

When religious congregations like the present disagree among themselves upon leading points of government or doctrine, the original system attracts primary notice ; and the rule I extract is, that when a religious congregation, society or church, dissentient from the Established Church in England, is once completely organized with known doctrines and a settled form of government, and property is afterwards given to or purchased for the use or support of such establishments, it is not, *quoad* such property, competent to one part (whether of a select body or the whole connexion) to change the doctrines or remodel the government, and to adopt new doctrines or a different economy, against the will of the residue ; but that, when there are dissentients, the original constitution of the association must be upheld, unless where it may on the face of it impart more ample provision in unequivocal language. If this rule be sound, I have endeavoured to apply it to the present case. The changes intended here appear to me equally substantial with some of those mentioned in the case alluded to, and at least sufficiently so to bring this within the spirit of the rules by which they and other analogous decisions were governed.

Attorney-General v. Pearson, 3 Merivale, 353.—*Per* Lord Chancellor. — “ If it turns out that the institution was established for the express purpose of *such* form of *religious worship*, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, ‘ We have changed our opinions ; and you, who assemble in this place for the purpose of hearing the doctrines and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration which has taken place in our opinions.’ ”



“In such a case, therefore, I apprehend—upon authority in the House of Lords upon an appeal from Scotland, previously referred to (a)—that where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to, as the guide for the decision of the court; and that, to refer to any other criterion—as, to the sense of the *existing majority*—would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this court. \* \* \* \* \*

“I must here again refer to the principle, which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from Scotland—namely, that if any persons, seeking the benefit of a trust for charitable purposes, should incline to the adoption of a different system from that which was intended by the original donors and founders; and if others of those who are interested think proper to adhere to the original system, the leaning of the court must be to support those adhering to the original system, and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be. Upon these grounds, I have nothing at all to do with the merits of the original system, as it is the right of those who founded this meeting-house, and who gave their money and land for its establishment, to have the trust continued as was at first *intended* (b).”

In 2 Jac. & Walker, 247, the Lord Chancellor said, “It was settled in the House of Lords, that when the doctrines originally agreed on are not adhered to by all the congregation, some having changed their religious opinions, the chapel must remain devoted to the doctrines originally agreed on.”

*American Cases.*—20 Johns. R. 12, Trustees of the Reformed Calvinist Church of Conajahana v. Diffendorf; 7 Halsted Den. v. Bolton et al.; 3 Desaussure, 557, a case between two masonic lodges; 5 Mass. 96, Chief Justice Ewing’s opinion, in Shotwell v. Hendricson & Deacow, 27,

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(a) Craigdallie et al. v. Aikman et al., 1 Dow. 1. (b) 3 Mer. 418.



the celebrated Quaker case, involving a consideration of the disputes between the orthodox Quakers and the Hicksites: he says, "We are not to interfere with their church government, any more than with their modes of faith and worship; we are to respect their institutions and sustain them."

In 1 Dow. 16, Lord Eldon says, "The court may take notice of religious opinions as facts pointing out the ownership of property."

3 Mer. 413.—"Upon the clause respecting the desertion or removal of any of the trustees, which occurs in this deed also, and contemplates the event that the trustees 'should change or become of any other religion or persuasion whatsoever, contrary to and different from the said congregation,' I must observe that, if the question comes before the court in the execution of a trust, whether a trustee has been properly removed, and that point depends upon the question whether the trustee has changed his religion and become of another (as in this instance) different from the religion of the rest of the society, it must then be, *ex necessitate*, for the court to inquire what was the religion and worship of the society from which he is said to have seceded; not for the purpose of animadverting upon it, but in order to ascertain whether or not the change is substantiated."—3 Mer. 412, S. P.; 1 J. & W. 248; 3 Mer. 419; *Field v. Field*, called the Purchase Case (Quakers), New-York, 7 Sergt. & Rawle.

In *Davies v. Hawkins*, 3 M. & S. 488.—Where several persons formed a company for brewing ale, and entered into a deed, by which it was agreed that the conduct of the business should be confided to two persons, and the trade carried on in their names; and that they should be trustees, and bring actions, &c.; that *a committee should be appointed, with power to make rules, orders and by-laws*, subject to confirmation by a majority of the proprietors at a general meeting; and that a general meeting of the members of the company should be holden every quarter; also that the directors or committee for the time being should have power to direct and regulate the general affairs and business of the company, the directors recommended the general quar-



terly meeting to appoint only one instead of two managers, who accordingly appointed the plaintiff, who sued the defendant (one of the company) for beer sold. Lord Ellenborough said, "It is not stated the defendant had notice of the appointment of one only. A change had been made in the constitution of this company, which could not be made without the consent of the whole body of the subscribers. It was such a substituted alteration in its constitution as required the assent of all. It does not appear that the defendant acquiesced, or ever knew of the alteration."

Bayley, J.—"It is stated the subscribers appointed the plaintiff. If by that had been meant *all* the subscribers, it might have made a difference."—15 Ves. Junr. 88, 234; 3 V. & B. 151-8; 4 B. & C. 799, 818; 3 T. R. 375, 646.

My opinion, confined to the subject of Episcopacy, renders of secondary importance the power delegated to the British conference touching the presidency. Was it necessary to express an opinion on that head, I am disposed to think it was not in the discretion of the general conference to subject the office to another jurisdiction, so as to place the right of electing the head of the Church, which belongs to themselves by the terms of the discipline, in the hands of another body, with which the Church had not enjoyed any previous intercommunion or immediate connexion; and as little would it seem justifiable in the same conference to merge its own existence in a new yearly conference differently constituted.—13 East. 368; 3 Bur. 1834; 4 Bur. 2521; 2 Inst. 597.

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#### DOE DEM. BELL V. ORR.

The deed of land sold for taxes may be made by the sheriff to the assignee of the highest bidder.

Land which has not been described by the surveyor-general is not liable to be sold for taxes.

Ejectment for part of lot 24, in the 1st concession of Loughborough.

The land had been sold for arrears of taxes, under the assessment laws, and had been bid off at the sale by one



Truax. The sheriff's deed was made to the defendant Orr, to whom it was stated in the deed Truax had assigned it.

The lessor of the plaintiff disputed the legality of the sale, and brought this action to try the title of the vendee of the sheriff. He produced the king's patent to himself for the whole lot.

The defendant then proved his title under the sheriff's deed, to which the plaintiff took the following exceptions :

First, That the land was not liable to be charged with taxes, being an unoccupied lot, that had never been described by the surveyor-general.

Secondly, That it was not proved that there was no distress on the premises by which the taxes might have been levied.

Thirdly, That there was no proof of regular advertisement, and other formalities, by the sheriff.

Fourthly, That no authority appeared for making the deed to any one but Truax, the highest bidder.

ROBINSON, C. J.—As it is important that the several points which arise upon this statute should be settled as plainly and speedily as possible, we will state shortly our opinion upon these several objections ; although it is not necessary, for the decision of this case, to go beyond the first objection, because we think that objection sustained, which puts an end to the defendant's case.

Upon the other objections, we are of opinion that it is indispensable, in making title under a sheriff's deed of land sold for taxes, to shew that there was no distress on the premises ; and indeed the court have before decided that question. In this case, we think that was reasonably proved when it was shewn to the jury that the lot was in a state of nature at the time of the sale, and was never occupied by any person until some time after.

As to the third point, the 22nd clause of the Assessment Act, 6 Geo. IV., ch. 7, puts an end to all question upon it. In the absence of such a provision, it might perhaps have been material to shew a strict compliance with all the forms which the act required ; but the legislature enacts, in this clause, that, for any irregularity in not advertising, or other



informality, the sale shall not be avoided, but the sheriff shall answer for any injury occasioned.

The fourth objection we think not material. The statute clearly allows the sheriff to recognize an assignment by the highest bidder (a), and he may make his deed to the assignee. He recites in his deed that Truax had assigned to Orr; and as no one but Truax is concerned to deny this, and he appears to acquiesce, there is no need to inquire with what degree of formality the assignment was made. It cannot affect the interests or rights of Bell.

To return to the first objection, which we think is sufficient to defeat the title attempted to be set up by the defendant. It appears, on examination of the statute 59 George III. chapter 7, that the legislature, in passing it, had two distinct objects in view :

First, To embody in one act, with some few alterations, the existing laws respecting the imposing and collecting of rates upon property in the actual occupation of the resident inhabitants of the several towns and townships :

Secondly, To commence a new system of imposing taxes upon lands lying waste and unoccupied, where the owner is not resident in the township, and is not therefore called upon to give in such lands to the assessor.

With respect to the first object,—the rating lands according to the old system, where the owner was at hand to be called upon by the assessor,—it had always been thought reasonable to subject them to taxes, although no patent had issued, and though they were only held by land-board certificate, order of council, or certificate of any governor of Canada (b). In this respect the legislature made no change, and the provision was just and expedient; for thousands of persons have lived for years upon lands which they held in this manner; and while thus occupying the land, it is reasonable they should pay taxes, though they may choose to delay suing out their grants. But when they commenced the new system of taxing unoccupied lands belonging to absent owners, which is first touched upon in the 12th clause, they declared that the surveyor-general shall return a schedule of

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(a) See 18th clause of 6th Geo. IV. (b) 59 Geo. III. ch. 7, sec. 41.



all lands that have been *described* or granted by his majesty in fee or for a term of years; and such lands as have been *described* are to be charged with taxes, as the act points out. In speaking of lands that had been *described* by the surveyor-general, the legislature used a term well understood, and that, by the usage of the government, has a known definite meaning attached to it. A lot merely located, is frequently never granted to the locatee. The location is sometimes changed, sometimes rescinded, sometimes treated as abandoned when the locatee has been long unheard of, and sometimes cancelled for non-performance of settlement duties, &c.; and the effect of treating lands so situated as liable to forfeiture for non-payment of taxes, would be to create much confusion in the departments of the government, and to divest the crown of its estate for a forfeiture, while the land had really no representative subject to taxation. When a lot is *described*, on the other hand, all difficulties respecting the location are considered to be cleared up; and it is well known that when the surveyor-general reports that a lot has been described, it is presumed in the public offices that a patent is out for it, unless the secretary, on search, reports otherwise.

There was a reason, therefore; for making this distinction; and the legislature have made it in terms that are understood; and it is our duty to give effect to it, though the two statutes might have been so framed as to make the intention more perfectly evident.

As the act is penal in its consequences, leading to a forfeiture, we are not at liberty to depart from the most obvious construction, in order to give it a greater latitude of operation.

As this lot had never been *described* till long after the sale by the sheriff, we are of opinion it was not liable to the rates charged against it, and for the payment of which it was sold.

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## DOE EX DEM. WIMBURN V. KENT.

*Covenant to quit premises at the expiration of the term.*

Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time—*Held*, that on ejectment brought by the lessor at the end of the term, the lessee could not set up a former lease to himself for a longer period.

Ejectment for lots nineteen, twenty-eight, and sixty-five, in the township of Niagara. Demise laid 15th June 1836.

On the trial at Niagara, before Sherwood, J., the plaintiff proved a lease, dated 13th June 1834, from the lessor of the plaintiff, by his attorney, G. S. Boulton, to Joseph Kent, for two years, at a yearly rent of 25*l.*, and the lessee covenanted to keep in repair, to commit no waste or injury, and that he would, “at the expiration of the term, yield up quiet and peaceable possession thereof, without any notice to quit, or other formalities of law.”

It was proved by the person who served the declaration, that the defendant then said he had a lease of the premises from Joseph Kent, his brother; and that he was aware that his brother's time had expired, and had taken a lease from him since it had expired.

For the defence, a letter of attorney was proved, dated 3rd October 1828, from Rowland Wimburn, of Middlesex, England, to William Kent, Esquire, of Saltfleet, appointing him his attorney to conduct and manage all his affairs, as executor or trustee of the estate in Upper Canada of the late Joseph Count DePuisaye, whose will devising his estate real and personal in Upper Canada to Rowland Wimburn, his heirs, &c., upon certain trusts, was recited in the letter of attorney, and empowering him to enter upon his farms, lands, &c., in Upper Canada, to see the state and defects of reparation thereof; and to oversee, set, let, manage and improve the same, to the best advantage; and to contract with any person or persons for leasing all or any of the said premises for any term or number of years, and to set fines for new leases, to execute leases, to demand and receive rents, distrain, &c., as may be necessary.

This instrument shewed that Wimburn was devisee of these premises upon certain trusts declared in the will of



Count DePuisaye, and that he empowered William Kent to lease to the best advantage the estates which he so held on trusts.

It was proved also that the same William Kent had held also a power of attorney from the Count DePuisaye, dated the 28th December 1827, giving precisely the same power, in the same words—this power was revoked by the Count's death in December 1827.

On 7th May 1831, a lease was executed from Joseph Kent to William Kent, reciting the power of attorney from Rowland Wimburn, and under its authority leasing the premises in question (three hundred acres in Niagara), for 999 years, at the yearly rent of 5s., and in further consideration of 500*l*. The lease is headed as between Rowland Wimburn and William Kent of the one part, and Joseph Kent of the other part; the words of demise are: "he the said Rowland Wimburn, by his said Attorney William Kent, doth grant, lease," &c. &c., reserving the 5s. rent to Rowland Wimburn, not saying to whom 500*l*. was, or was to be, paid.

"In witness, &c., the parties to these presents have hereunto set their hands and seals the day, &c.

(Signed)

"JOSEPH KENT,

"WILLIAM KENT."

It was proved that William Kent, the agent, was put into possession by Count DePuisaye nearly thirty years ago: that Joseph Kent (his son) went into possession under this lease for 999 years, and was so in possession when he accepted the lease for two years from Mr. Boulton, as attorney of Wimburn, and that William Kent, this defendant, is also a son of William Kent the agent.

Verdict for plaintiff.

ROBINSON, C. J.—It is quite clear that the rule for a new trial in this case must be discharged; there is no ground on which the plaintiff's right to recover could be resisted.

It is impossible that any title can be made out in William Kent the elder, under the Statute of Limitations, his long possession can signify nothing, because it was clearly not adverse. On the contrary, the evidence given for the defendant shews that he was in possession as agent for the Count



DePuisaye, under a letter of attorney from him, and after his death as agent for Wimburn, the Count's devisee in trust.

Then, as to this extraordinary lease for 999 years, made by William Kent the elder to his son Joseph, it would be absurd to contend that that was a good execution of the power given him by Mr. Wimburn. It is not a leasing and setting the place for the best advantage. It is in effect an attempted alienation, and fraudulent on the face of it.

Then it is not so executed, at any rate, as to make it valid; for Kent, the attorney, signs his own name only, not professing to set either the signature or seal of his principal.

And, independently of these objections, no title could be set up under this instrument, because it is clear that when Joseph Kent afterwards accepted a lease from Mr. Wimburn, through his attorney Mr. Boulton, though only for two years, that amounted to a surrender in law of any term he might have held at the time.—Bac. Abr. Lease S.; Ive's case, 5 Rep. 11, a: "Lessor made a lease for sixty-two years, and afterwards made another lease of the same manor to the same lessee for thirty years. The court resolved that the lease for the sixty-two years was presently surrendered, because the lessee by acceptance thereof had affirmed the lessor to have ability to make the new lease, which he had not if the first lease should stand."

And this defendant besides is estopped from making any defence of this kind, for he is proved to be in possession under Joseph Kent, who was bound at the expiration of the lease he had taken for two years to resign his possession to Mr. Wimburn, his landlord. He could set up no title which would disprove his landlord's right to make that lease, though he might shew (if the fact were so) that this interest which his landlord then held had since expired—2 Taunton, 283; 2 Campbell, 11.

Rule discharged.

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## FORD ET AL. V SPAFFORD.

An attorney may maintain an action for his fees in a cause which he does not bring to a conclusion, if he can account satisfactorily for not proceeding. After a verdict has been given the court will not order the plaintiff's bill to be referred for taxation.

The plaintiffs, as attorneys of this court, brought this action against the defendant for services rendered in numerous suits prosecuted and defended at his instance.

The cause was tried before Macaulay, J., at the last assizes at Brockville. The defendant objected to many of the charges, on the ground that the suits were not conducted to a final issue, and on other grounds, and a verdict was taken, subject to be reduced by the court striking off any items which, upon discussion, they should think unsupported.

The defendant accordingly obtained a rule to shew cause why certain items should not be struck out, and why the bills in the several actions should not be referred to the master for taxation.

Affidavits were filed by the plaintiffs on shewing cause, very minutely answering the various objections of the defendant.

ROBINSON, C. J.—I think the plaintiffs' affidavit is strong to shew that the defendant in this case has no merits. With respect to the attorney's right to costs in an action which he has not conducted to its termination, it does not appear that he is precluded from recovering for the services he has rendered, unless he has unwarrantably abandoned his client's cause. It is not held now, as it once was, that he is bound to proceed whether he is indemnified against disbursements or not. In all the cases pointed out by the defendant, the plaintiffs, in my opinion, account reasonably for not proceeding further than they did.

As to referring the bills to be taxed in this stage of the plaintiffs' cause, it would be contrary to the well established course. Bills are required to be furnished a month before the action is brought, in order that the defendant, if he pleases, may have them taxed. If he makes no use of this opportunity, he is understood not to object to the *quantum* of allowance, and it would be contrary to all rule to stay proceedings at this late day, in order that he may have the bills taxed.

Rule discharged.



## MOLSON ET AL. V. McDONELL.

*Evidence—Admissibility of copies of exhibits.*

Sworn copies of exhibits filed in the Crown office cannot be received in evidence; the originals should be produced.

This case was tried at the assizes for Cornwall in 1835, and a new trial was granted. The cause was taken down again to trial at the last assizes, and the plaintiffs required certain letters and other documents, which he had given in evidence on the former trial, and which, having been filed as exhibits, remained in the Crown office at Toronto, with the record.

Application was made for them, it seems, to a judge in chambers, by an agent for the plaintiff's attorney, a very few days before the trial, but the learned judge did not feel himself at liberty to direct the writings to be handed over to the plaintiffs' attorney without some evidence that the plaintiffs were the parties to whom they belonged. The attorney who applied was not particularly instructed, and, meeting with this difficulty, he took no further steps to procure the originals, and, probably, time did not admit of it; but examined copies were obtained from the Crown office, and the plaintiffs endeavoured to use these copies in evidence. The defendant objected that the originals should be produced; and the learned judge, under the circumstances, received the copies, subject to the exception. The plaintiffs recovered a verdict, and the objection has been renewed, on a motion to set aside the verdict, on the ground that these copies of papers were illegally received in evidence.

*Per Cur.*—We are of opinion that the defendant was entitled to insist upon the production of the originals; and if, from any misunderstanding, or want of due care or diligence, these were not procured, the plaintiffs should have countermanded their notice, or withdrawn their record. These exhibits do not come under the case of affidavits or other parts of legal proceedings in a cause which are required to remain among the papers of the Crown office, and of which,



therefore, copies are always admissible. These were private documents belonging to the party, and as necessary to be produced to the second jury as to the first. For all we know, in a case of this kind, the authority of the documents might be in question, or post marks or other memoranda endorsed upon letters might become material; and it is not fit that the jury should be required to decide upon the view of copies, when the originals might be produced to them.

There is no merit in the objection in this case. It has not been suggested that the copies here would not have answered the ends of justice as well as the originals; nor is it shewn that any injustice is done by the verdict. The objection is rigid, considering that it was by an accident the plaintiffs were disabled from producing the original letters, though we feel it necessary to grant a new trial. The costs are to abide the event.

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#### SHIPMAN V. BERMINGHAM ET AL.

*Jury—Special jury improperly struck—Waiver.*

Where a special jury was improperly struck, but the defendant's attorney was present and made no objection; *Held*, that he could not afterwards, on that ground, move for a new trial.

In this case a special jury had been struck.

At the trial at Brockville before Macaulay, J., it was objected that the special jury was irregularly struck, being taken from a list furnished by the clerk of the peace for the year preceding, instead of the current year, as directed by the statute.

The trial was allowed to proceed, and it was moved last term to set aside the verdict upon the same objection. A rule nisi was granted. It appeared on shewing cause, that the attorney of the party making the objection attended at the striking of the jury, and was aware that the list was of the last year, none for the current year having been yet furnished to the sheriff, and that he concurred in striking the jury, making no objection on that ground.



*Per Cur.*—A list for the current year not having been furnished to the sheriff, it was not possible for him to comply with the direction of the statute. Both parties knew this, and the objection was reasonably waived. It is stated that the attorney, when he assented, was not aware of what the law required, though he knew the fact; but he was as much bound to know the law as the other party was and, being aware of the fact, he cannot, in a matter of practice of this kind, retract his assent after the act done.

Rule discharged.

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THOMPSON V. HAMILTON, SHERIFF OF NIAGARA.

*Tender—Plea.*

A plea of tender and refusal, and that the defendant was always ready to pay at a particular place, held sufficient, on general demurrer.

The plaintiff sued for money levied by the defendant on an execution at his suit.

The defendant pleaded a tender in common form, except that he averred the tender to have been made by one McLeod, his deputy, at the sheriff's office, in Niagara; and, instead of saying that he was always ready afterwards to pay, &c., in the general form, he pleaded that he was ready to pay at the sheriff's office, &c.

The plaintiff demurred generally to this plea.

*Per Cur.*—The plea is clearly good (whatever the facts may have been) for it states a tender in positive terms.—1 Saunders 33, note 2. Adding a particular place where the tender was made, viz. in the sheriff's office, can do no harm, for the plaintiff states that he tendered the money to the defendant, who refused to receive it. The defendant must, therefore, have been present and the tender personally made to him.

As to the averment that follows of readiness to pay, it is material, no doubt, but it is sufficiently pleaded here.

After tender once made, the defendant is not bound to offer the money again, but he must be ready to pay afterwards, if requested; and, if the plaintiff demands and the



defendant does not pay, the effect of the tender is lost, but he should reply that fact. The defendant, after a tender, is not bound to seek the plaintiff again, and being ready at his own office, or anywhere else, is enough, since he may wait till a demand is made upon him.

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### BREEZE V. BALDWIN.

*Promissory note—Second indorser paying note and afterwards suing prior indorser.*

A second accommodation indorser, who has paid a promissory note discounted at a bank for the benefit of the maker, may maintain an action on the note against a prior accommodation indorser, and may indorse it over after it is due.

In this case, Breeze, the indorsee of a promissory note, sues Baldwin, an indorser. The facts proved at the trial were these. One Shier, wanting accommodation, makes a note to the defendant or order for £100; and the defendant and one Dougall indorse it in blank. Dougall was the first applied to by Shier, but he declined until Shier should procure a good indorser before him; in consequence of which the defendant was asked to indorse and consented. Shier therefore made this note payable to the defendant or order for £100—and the defendant and Dougall indorsed it. It was discounted by the Commercial Bank, and not being paid when due, Dougall is notified by the Bank and compelled to pay the note. He afterwards indorsed it to the plaintiff for a valuable consideration. The jury, upon the trial at Kingston before Macaulay, J., found expressly that the defendant was an accommodation indorser.

The note was made payable at the Commercial Bank. The proof of presentment at the Bank when due was by producing the entry in the book kept for that purpose at the Bank, by a clerk who has since died, and whose duty it was to note bills and notes lying unpaid at maturity.

It was objected at the trial that this was insufficient evidence of presentment, and it was further objected, that this note being paid by Dougall after it fell due, could not afterwards be assigned by him to the plaintiff, so as to give such



plaintiff a right of action against the defendant, a previous indorser. It was contended that it had lost its negotiable quality.

It was further objected that no action lies under these circumstances against the defendant, an accommodation indorser, who received no value for the note, and who did not in fact transfer it to Dougall, the plaintiff's title being derived from Dougall, who transferred the note to plaintiff, after it became due.

The learned judge inclined to the opinion at the trial, that, if the jury found this to be an accommodation note, an action for this plaintiff against the defendant would not lie, under the facts of the case; and the jury, under his direction, found for the defendant, subject however to the opinion of the Court upon the evidence, and with leave to enter a verdict for the plaintiff, if the Court should determine that he had a right to recover.

The several objections raised at the trial have been renewed here.

ROBINSON, C. J.—With respect to the proof of presentment, we have no doubt that it was sufficient. The handwriting of the deceased clerk was proved, and it was shewn that the entry was made by him in the discharge of his ordinary duty at the time, and under circumstances which raise no suspicion of his accuracy.

The same point has occurred before at trials in this Province, and what was done here was all that could reasonably be done at the time to preserve evidence of the presentment. If such evidence were not admitted, parties would frequently be deprived of their right by the death of witnesses,—3 Campbell 305; 15 Ch. 32; Bingham's New Cases, 649.

As to the objection, that after payment of the note by Dougall he could not indorse it to the plaintiff, and thereby enable the latter to recover against the defendant, we are quite clear there is nothing in it. The distinction upon this point is well settled. Until a note, or bill, has been paid by the person originally liable upon it, it continues



to be negotiable *ad infinitum*; so that the right of action, which the holder for value must necessarily have against him, may be transferred from one to another, notwithstanding some one of the latter parties to the note or bill may have paid it in his own discharge.

But when the maker of a note or the acceptor of a bill has paid it and taken it up, the original engagement has been complied with, and there is no longer anything to transfer: its negotiability is therefore at an end, and it can no longer be put in circulation, because the effect of that would be to render the indorsers upon the bill liable to a subsequent holder, when in fact the promise for which they were guarantees had been fulfilled. If therefore Shier or Baldwin had taken up this note, it could not have been indorsed over and put in circulation again, so as to have given a right of action against Dougall; because the payment of the note by a person who was liable before him, and for whom therefore he was in effect a surety, would have operated in his discharge and extinguished the note. Upon Shier's taking up the note, it would no longer have continued negotiable in any shape, or for any purpose. If Baldwin had taken it up, he might have struck out Dougall's indorsement, and sent out the note again into the world, because he would clearly have had a remedy on the note against Shier, and this right of action he could have transferred to another. So, by Dougall's taking up the note, he becomes the holder, and is not considered to take as by assignment from the Bank, but he is restored to his former standing among the parties to the note;—and the right of action which he has against all the antecedent parties he may of course transfer to another.—1 K. B. 89, and 3 M. & S. 97, 4 T. R. 471.

I am speaking now of notes generally, without regard to any peculiarity arising from this being an accommodation note. The objections must be kept distinct; and, with regard to this last objection, it is maintained that no action lies by one of the two indorsers of this note against the other, inasmuch as neither of them received value for the note, when he indorsed, and both merely lent their names



for the accommodation of the maker, with the knowledge of each other. Since it is clear that Dougall having taken up this note could assign it to the plaintiff, and that the plaintiff, taking it after it was due, could have no better right than Dougall himself had after he became the holder, the question in fact amounts to this:—whether Dougall, the second accommodation indorser, having taken up the note, paying its value to the Bank, who discounted it, could recover from the first accommodation indorser, assuming that both knew the note to have been a mere accommodation note intended to be discounted for the accommodation of Shier.

Since the establishment of Banks, these transactions have become matters of daily occurrence, and it ought not now to be a doubtful question, whether one of two accommodation indorsers, having taken up a note, can sue the other. I know not what may be the prevailing impression upon the subject; but I imagine that, in general, when a person is asked to indorse a note merely to give it credit, he does not think it immaterial to consider whether those who have indorsed upon him are men of good property and credit, or the reverse. On the contrary, he complies much more readily, I think, when he sees that persons have indorsed before him who are undoubtedly solvent; and he acts usually, I believe, under the impression, that the prior indorsers may be held to stand between him and all loss. Nevertheless, it has never been judicially determined here, whether the indorsers are, or are not, liable one to the other, under such circumstances. The learned judge who presided at the trial of this cause appeared to be of the opinion, that the action did not lie, and that certainly was my impression, until I was compelled to examine particularly into the grounds on which such an opinion could be supported. Having now examined the question, I do not see that the plaintiff's right to recover in this case can be denied on any satisfactory reason or authority, and I am of opinion that he was entitled to recover the amount of the note and interest. Courts of law have recognized distinctions between accommodation bills and notes, and



those of the ordinary description. In the first place, as to the necessity for notices between the several parties, of non-payment, &c.—on which point there have been some inconsistent decisions: Then it has been determined, that when the acceptor of a bill for the accommodation of the drawer, or of an indorser, fails to pay the bill, if such drawer or indorser has, in consequence, to pay the bill, he can have no action against the acceptor, and this for an obvious reason. But the Courts have not been in favor of extending the distinctions in favor of accommodation notes; on the contrary, they have occasionally expressed their regret at some of these having been established. Now I cannot find any authority for saying that the distinction should be carried, or has been carried to the length the defendant has urged it here. I have met with no case where it has been decided that an accommodation indorser of a note is not liable to a subsequent accommodation indorser who has taken up the note, and thus become the *bonâ fide* holder for value.

It is maintained, on the part of the defendant, that both these indorsers are to be looked upon as standing in the same situation upon this note—namely, both equally liable, and under similar circumstances to any person giving value for it: liable, that is, not because they received value for the note as it passed through their hands; but liable, because they both consented to guarantee the payment to any one who would give the maker value for it.

When Dougall, one of the sureties, has consented to pay it, his remedy, it is contended, is against the maker, for whom he became guarantee, and for whom he has paid the money; and not against Baldwin, who stands, like himself, in the place of a surety—equally liable to the Bank, if they had chosen to resort to him, but not liable upon the note to Dougall, the other surety.

I am now satisfied that this view of the case cannot be supported. In *Mule v. Baxter*, 3 E. R. 175, it is decided that the remedy between these parties must lie upon the note or not at all. Since Dougall did not indorse at the request of Baldwin, and, consequently, when he paid the



money, cannot be said to have paid it for him, or at his request, he must therefore either have this action upon the note, or he has no remedy against him. Having taken up the note, he is now the holder for value. The Bank undoubtedly could have looked to Baldwin; and the same right which they had, Dougall has now acquired, and the effect of his paying and taking up the note, is to restore him to the order in which his name first stood on the note. He does not take as the indorsee of the Bank, but is restored to his original standing among the parties to the note, and he has the right to strike out his own indorsement and all subsequent; and then he stands in the place of Baldwin's indorsee, having now paid value for the note, and being therefore the person, and the only person, entitled to sue Baldwin upon it. If, when he was asked by Shier to indorse, he had declined doing so, but had preferred taking the note and advancing Shier the money upon it; then, undoubtedly, he could have looked to Baldwin the indorser, as well as to Shier the maker—and it would have been no answer to his action that Baldwin received no value, because it was not contemplated that he should; he indorsed expressly to give credit to the note and to guarantee the payment by the maker. Upon such a transaction, Dougall would have stood precisely in the situation of the payee of a bill of exchange, drawn by Baldwin on Shier, and accepted by the latter, but not paid by him, and though he did not advance the money, but consented rather to indorse his name on the note, yet by since taking it up, he has placed himself in the same situation he would have stood in, according to the case supposed.

In 3 Salk. 68, it is laid down, that every indorser is warrantor for the first drawer, and that is the plain light in which to view the question.

By indorsing this note, Baldwin in effect says:—"I will see this note paid to any one who gives value for it." Seeing that he has thus added his credit to that of the maker, Dougall indorses it after him, by which he adds his guarantee to theirs, not by one and the same act, but in succession, and he says, in effect:—"I also promise to pay if



the maker does not;" but, when he says this, he knows that he has the security of the maker and indorser of the note, and stands in the place of the payee of a bill, to whom both the drawer and acceptor are liable.

It is true, that he knew, when he indorsed, that Baldwin did not give value for the note, and did not indorse it to him for value, but he knew that his liability by indorsing was incurred for the consideration, that some one was to advance money on the note to his friend; which consideration was all that he stipulated for, or expected; and that he could therefore allege no failure of consideration, no deception or fraud. It could matter nothing to Baldwin who advanced the money, or who might, ultimately, on that account, look to him for payment. He deliberately undertook to guarantee the payment, and he knew that by his manner of becoming guarantee, he could look to Shier and to him alone. And besides, though he was known to have indorsed for Shier's accommodation, it is not known, and is not to be assumed, that he had taken no measures to provide for his security—or did not assume his responsibility upon terms well understood between him and Shier. He shews, at any rate, that he had satisfied himself of Shier's solvency and was willing to be bound for him. It does not appear, then, how the paying up the note by the next indorser (which *he* was first bound to do) can relieve him from his liability wholly; but it must do so, if Dougall could not recover against him, for the Bank of course has no claim on the note after Dougall has taken it up. I find nothing said in the treatises on bills with a view to this particular point. I imagine indeed it has never been doubted. But there is a case of *Siddons v. Stratford* in Peake's N. P. C., 281, before Lord Kenyon at *Nisi Prius*, which, as I understand it, does apply very closely to this question. That was an action by an accommodation indorser, who had taken up a note against the payee who had indorsed it; the parties were precisely the same as the present, except that the indorser, who took up the note and brought the action upon it, was the third indorser, who put his name on it at the request of the second indorser, to whom



it had been transferred for value. The cases agree in this, that the indorser bringing the action had paid no value till he took up the note, and that he became indorser merely as a guarantee for the previous parties.

The payee, whom he sued, was not, like Baldwin, an accommodation indorser, but the note had been given to him for premiums upon the insurance of lottery tickets, which was an illegal consideration. It was, therefore, in fact, not given for value, and was not capable of being enforced in the first instance, by the payee against the maker, any more than this note made by Shier. So that, substantially, the cases seem to rest on the same grounds. The objection was precisely that taken here, that the plaintiff had paid no value (in the first instance) for the note; but as it was shewn that he had been compelled to pay the note to a subsequent holder, Lord Kenyon answered the objection by saying, "Siddons was obliged to pay this money to Cowley, who came fairly and honestly by the note, and had a right to recover the value of it from any person who appeared to be a party to it. The plaintiff derives his title from him, and the defendant being clearly liable to pay the money to Cowley, it is no injury to him to be obliged to repay it to the plaintiff, who has paid it for him."

Now, putting Dougall in the place of Siddons, and the Bank in the place of Cowley, that case applies in terms to this—and is in point upon the question raised here. It is, to be sure, a *Nisi Prius* decision, but Lord Kenyon's language is direct and plain. He treats the case as a plain one, in favor of the indorsee's right of action, and his decision seems to have been acquiesced in.

I have all along spoken as if this action were brought by Dougall, because, as we all admit his right to indorse the note, the right of the plaintiff to recover must follow, if it appears to us that Dougall could himself have sued, and the question is simplified by considering the objection as if it were urged against Dougall.



## MOORE V. RAPELJE.

*Evidence.*

M., formerly deputy sheriff of the L. district, sues R. the sheriff for services in the execution of his office. At the trial the plaintiff produced an order drawn on him by the defendant in favour of one Rolph, desiring him to pay the latter £50 out of the monies he had received for sheriff's fees.

*Held*, that in absence of any further information, the mere proof of the payment of that order did not entitle the plaintiff to recover.

In this case the plaintiff, who had served many years as deputy sheriff of the district of London, sued the defendant (the sheriff) for services rendered in executing process. The declaration also contained common money counts. At the trial, the plaintiff, who had ceased for some years to be the defendant's deputy, did not attempt to make out a claim for services rendered; but, abandoning any demand on that head, he sought to recover upon producing an order, which the defendant had drawn upon him many years ago (while he was acting as deputy) desiring him to pay to J. Rolph, Esq., an attorney practising in the district, £50 out of the monies he had received for sheriff's fees.

The Chief Justice, before whom the cause was tried, was opposed to the plaintiff's recovering a verdict, and stated, that the proper construction to put upon the transaction was that the plaintiff paid the order, having funds of the defendant in his hands, and that the inference was the clearer in this case from the special terms in which the order was drawn: that it should be presumed that the plaintiff had in his hands an amount of fees for which he was accountable to the defendant (his principal) sufficient to cover this order; and, even if he had not, it was fair to presume that this transaction was taken into account between the parties in their subsequent transactions, before, or at the time of their business being closed. A verdict, however, was allowed to be taken, subject to the opinion of the Court, whether the mere proof of payment of that order entitled the plaintiff to recover.

The defendant, in Michaelmas term, obtained a rule nisi to enter a nonsuit, which the Court, in this term, made absolute, agreeing in the opinion of the Chief Justice that the plaintiff, in the absence of any further information, ought not to recover upon such evidence.



## O'NEIL V. BARNHART.

*Costs of the day.*

The defendant is entitled to the costs of the day, where the plaintiff does not enter his cause for trial on the commission day of the assizes, although he offers to enter it subsequently, which the defendant refuses to allow.

The plaintiff, by some accident or omission, not shewn to be excusable, did not enter his record for trial on the first day of the assizes. The defendant objected to its being entered afterwards, and now moved for the costs of the day, because the plaintiff did not proceed to trial pursuant to his notice.

The plaintiff resisted his application, on the ground that the cause might and would have been tried, if the defendant had not refused his assent to its being entered out of time.

*Per Cur.*—The defendant is entitled by the practice to the costs of the day. *Smith v. Gregg* (Barnes 464), is in point, and there is another case of *Duell v. Stow*: cases in *Prac. C. B.* 60, to the same effect. The reason for not entering the record might have been such as would excuse the party, but that is not shewn.

## DAVIS V. DAVIS.

*Costs—Issues in fact and in law—Some found for plaintiff and others for defendant.*

Where there are issues in fact and in law, and the issues in fact and one issue in law are in favour of the plaintiff, and an issue in law in bar of the action in favour of the defendant, the plaintiff is entitled to the costs of trial and of the pleading determined in his favour, and the defendant to the general costs of the cause.

The defendant had pleaded the general issue and two special pleas, which were demurred to. On one of these demurrers the plaintiff succeeded, and on the other the defendant.

The court, on motion to revise taxation, determined that the defendant, succeeding upon demurrer (and his plea being in bar of the action), is entitled to the general costs of the cause, not including the costs of the trial upon the general issue: that the plaintiff, succeeding upon the other demurrer, has the costs of that pleading; and the plaintiff, succeeding on the general issue, has the costs of that pleading and of the trial.



## VANDERBURGH V. VANALSTINE.

*Covenant for title—Breach—Plea of no eviction.*

In action of breach of covenant for good title, a plea that the defendant was the rightful owner (in the words of the covenant), and that the plaintiff entered upon and took possession of the premises, and never has been evicted, is bad on demurrer. As is likewise a plea that the plaintiff, before and at the time of the delivery of the Indenture, was in possession, and has not been evicted.

The plaintiff sued in covenant, setting forth that the defendant bargained and sold certain premises to him by indenture, and covenanted that he then was the true, lawful and rightful owner of the premises in the indenture mentioned and that he was lawfully and rightfully seized in his own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in the premises, without any condition, limitation, incumbrance, &c., and then assigns for breach that the defendant at the time of making the said covenant was not the true, lawful and rightful owner of the premises, and was not lawfully and rightfully seized in his own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple.

The defendant pleaded *no n est factum* and another plea, on which issue was joined, and also a third plea, in which he affirms, that, at the time of making the covenant he was the true, lawful and rightful owner, &c., and was seized of a good, sure, perfect, absolute and indefeasible estate &c., (in the words of the covenant) and averring further, that the plaintiff, from the time of the delivery of the indenture to the commencement of this action entered, had and took possession of the premises, and hath not been evicted from the same, or from any part thereof, &c.

He also pleaded a fourth plea, in which he does not affirm his title or seisin, but merely alleges that the plaintiff before and at the time of the delivery of the indenture was in possession of the premises and hath not been evicted.

The plaintiff filed a general demurrer to the fourth plea and demurs specially to the third, assigning for causes,



that it is double and puts in issue matter not alleged and not traversible.

ROBINSON, C. J.—I think the plaintiff is entitled to succeed upon both these demurrers.

If it were a bar to the plaintiff's action that he took possession and has never been evicted, then, as that is pleaded in addition to the defence that the defendant was the lawful and rightful owner and was seized of an absolute estate in fee simple, the plea is subject to the charge of duplicity; but I am of opinion that it is not a sufficient bar to the action, that the plaintiff has had possession and has never been evicted. If the defendant was not the rightful owner of the premises, and had not an absolute estate in fee simple at the time of entering into the covenant, then unquestionably, the covenant is broken. The defence set up, that the plaintiff has never been evicted would not have been counted an answer to a covenant for quiet enjoyment, but the breach assigned here is want of title, and that breach is assigned in the very terms of the covenant.

As to the fourth plea, it is clearly bad, for it merely affirms that upon and at the time of the covenant the plaintiff was in possession of the premises and hath not been evicted. It is impossible that that can be a defence, for it is not even alleged that his possession was under the deed, or derived in any manner from the defendant, and it leaves the breach of covenant as to want of title wholly unanswered.

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#### MCLEOD VS. TRUAX.

*Infancy* is not an inevitable difficulty within the fifteenth section of the registry act, so as to preclude the necessity of an infant devisee registering the will within six months of the death of the deviser, to avoid a conveyance by the heir at law.

Covenant on an indenture of the 29th November, 1833, whereby defendant bargained and sold to plaintiff in fee the north-west part of lot 120, in the town of Kingston, and therein covenanted that he had good right to grant and convey the said lands &c., free from incumbrances.

Breach—That the defendant had not then good right to grant and convey the said lands &c., free from incumbrance. Damages, £2,000.



Pleas—1st. “*non est factum.*” 2d. That defendant was seized, and had good right to convey, &c., free from incumbrance.

Replication.—Re-affirming the breach. Deed of defendant to plaintiff, 29th November, 1839 was admitted.

Consideration . . . . £300 0 0

Interest since . . . . 106 4 6

Total . . . . . £700 4 6

No one in actual possession.

It was objected that the plaintiff could not recover the purchase money unless she had been ousted.

The defendant shewed as his title a patent to Mary Merrick, 6th December, 1803, and conveyance from heir of M. Merrick to Oliver Thibodo, registered. Deed from Augustin Thibodo, heir of Oliver Thibodo, to defendant, registered before the death of Thibodo.

Then a will of Oliver Thibodo was shewn, by which he devised his real estate to his wife for life (now dead) and after her death to his three children, to be equally divided, (of whom Augustin was one) “to inherit the same during “their natural lives, and then to descend to their next of kin, “and so alternately.” These children were still all minors. The widow survived the testator and is since dead. The executors took out probate from the Midland Surrogate Office. This will was set up to shew that the defendant had no right to convey.

The plaintiff contended that the heir could convey because the will was not registered in the county registry office, but it was answered that the children being minors excuses them.

*Per Cur.*—Having considered the arguments of this case upon the concilium last term, we are of opinion that the defendant is entitled to a verdict.

Our Registry Act declares that wills whereby real estate is devised may be registered, and that the memorial may be under the hand and seal of some or one of the devisees, his or their heirs, executors or administrators, *guardians* or *trustees*; and then since it has provided that wills may be registered, it directs that they shall be, or rather it virtually



compels it under the same penalty as in case of deeds—namely, that when once an entry has been made in the County Register of a conveyance or devise of any land, any deed or devise that may afterwards be made of such land shall be adjudged fraudulent and void against any subsequent purchaser for valuable consideration, unless a memorial of such deed or will be registered before the registry of the conveyance under which such subsequent purchaser may claim.

This being a registered title since the registry of the deed to Oliver Thibodo, the ancestor, of course the statute applies; and as the heir at law conveyed to Truax by a deed which has been registered, the devisees claiming under a will, which is still unregistered have lost the estate, unless they were excused by reason of some “inevitable difficulty.”

Now this question turns wholly upon the fifteenth clause of the statute, which provides that if the memorial of a will be registered within six months after the death of the deviser, dying within this Province, it shall be as valid as if registered immediately after his death; and it proceeds to enact that in case the devisee, by reason of the *contesting the will* or other inevitable difficulty, without his wilful default, shall be disabled to exhibit a memorial for the registry thereof within the time limited, then the registry of the memorial within six months after his attainment of such will, or a probate thereof, or removal of the impediment whereby he was disabled or hindered to exhibit such memorial, shall be a sufficient registry within the meaning of the act.

This act is evidently framed on the English registry acts, and it follows their principles and provisions so closely in the main, that it is safe and just to pay regard to those acts in placing a construction upon ours. They will serve as helps, at least, where ours makes no different provision in terms, and when we are left to conjecture the meaning of the Legislature in some measure from a consideration of the subject matter. It is plain they had these British statutes in view, and meant to frame a system to answer the



same objects, by the same means, except in one or two instances, in which their intention to depart from it is evident. I allude to the British statutes 2 Anne, ch. 4; 6 Anne, ch. 35; 7 Anne, ch. 20, and 8 Geo. II. ch. 6.

The first of these statutes very closely resembles our act in the provisions respecting wills: the memorials are to be signed by the same persons—that is, the devisees or one of them, his or their heirs, executors, administrators, guardians or trustees; and the difficulty specified as a disability is the same—namely, the contesting the will, or other “inevitable difficulty.” All the English acts differ from ours in this, that when the devisor dies abroad, they allow a longer period than six months for registering—namely, three years. Our statute allows six months, *when the devisor dies in the Province*, but makes no special provision for the case of a devisor dying abroad. This is evidently an omission, and it is worth considering what may be the effect of it in cases where the devisor dies out of the Province. In this case no such question arises.

The 6 Anne, ch. 35, 7 Anne, ch. 20, and 8 Geo. II. ch. 6, differ from the 2 Anne and from our act, in this, that they require a memorial of the contest of the will, or other inevitable difficulty which impedes registry, to be entered within six months from the death of the testator.

And the 7 Anne is so much more rigid than the others in enforcing the registry of wills, that it provides, that in case of the concealment or suppression of a will, which is the strongest possible impediment to registry, the purchaser from the heir shall not be defeated in his title unless the will be actually registered within five years after the death of the devisor. The 8 Geo. II. has a similar provision, but allows only three years.

These peculiarities in the British statutes were very properly alluded to in the argument. It will be seen that our Legislature was in one respect less careful in guarding the interests of devisees, in omitting (probably by accident) to allow any time in case of the devisor dying out of the Province. In other respects they were more liberal; they give the devisor the benefit of exemption by reason of



inevitable difficulty, without requiring him to register the cause of such difficulty within six months or at any time ; and they allow him the benefit of the excuse, so long as the difficulty lasts ; while some of the British statutes will not allow the purchaser to be kept in suspense beyond a limited time ; and whether the registering be possible or impossible, the devisee must either contrive to effect it within the time limited, or he may lose his estate. Now the statutes which place the devisees upon this footing use the very same words as ours in describing the impediments ; they say, where the devisee is disabled from registering “by the will being *contested, or other inevitable difficulty, without his wilful neglect or default.*”

When infancy, coverture, unsound mind, or absence beyond seas are meant to be admitted as exceptions, they are usually enumerated, and the Legislature are in the constant use of a phraseology applied to that purpose. Here they notice the probable case of the deviser dying abroad, but they make no provision for the case of the devisee being abroad ; and, as to coverture, infancy or unsound mind, they make no allusion to them as causes of exemption.

And as to the English statutes, we should conceive it unreasonable to suppose these were meant to be recognized as inevitable difficulties, because they may or may not present difficulties according to the circumstances, since the law allows the memorial to be executed by a guardian or trustee.

The same Legislature which provided that even the suppression of the will, and consequently the utter ignorance of the devisee that it existed, should only protect the devisee for three or five years against the heir's conveyance, could surely not have meant to recognize infancy, coverture, or unsound mind, as exemptions, because while these exist they continue to present the same difficulty, and they might operate for twenty years, and some of them much longer.

The English statutes, which will not allow the concealment of the will to privilege the case of the devisee beyond a certain time, lay down the principle, that a will not brought to light in that time may be treated by the heir as



no will. Ours have not gone this length, but while they were in this respect more liberal, we do not see upon what authority we can conclude that they meant to give to the words "inevitable difficulty" copied from the British statutes a latitude of meaning which in those statutes it would be absurd, we think, to ascribe to them.

In the case before us, we think the plaintiff fails, because she has not shown an *inevitable difficulty*, and until that be shewn the conveyance by the heir being registered must prevail against the title of the devisees.

An infant may have a guardian. When no guardian is otherwise appointed our statute law provides for it upon proper application. It is not shewn here that there was no guardian, or that the means of obtaining the appointment of one were inconvenient. If infancy may, under circumstances that are fully shewn, be held to present an inevitable difficulty, no such circumstances are shewn here; and consequently, if it be allowed in this case to privilege the devisees, it must be taken to be in all cases under this act a cause of exemption *primâ facie*, and without anything more being shewn.

It may be remarked, that the heir at law is one of the devisees. He might consequently have executed a memorial for the registry of the will; and if, knowing of the devise, he continued thus to defeat it, by making a conveyance as heir, his intention was certainly fraudulent; but nevertheless in equity, even the purchaser from the heir would still gain priority by registering, unless he also had notice of the will.

Without deciding that infancy can under no circumstances form an impediment, it is sufficient to determine that it cannot be allowed as such upon the evidence given in this case.

We do not say, that because the plaintiff has not been evicted, she could bring no action upon this covenant, supposing the defendant to have had no title when he conveyed to her; nor do we say, that she must necessarily, under such circumstances, be confined to nominal damages. But she is not entitled to a verdict, in our opinion, because she has not shewn the defendant's title to have been bad,



and because she is, besides, clearly premature in bringing this action, since the devisees, when they come of age, may, for all we can tell, suffer six months to elapse without registering, and then the heir's title, or rather the title derived from him, will be confirmed unquestionably.

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DUGGAN V. BORLAND.

*Promissory note—Bearer—Declaration.*

In a declaration by the holder of a promissory note payable to bearer, it is not necessary to aver that the note was assigned over and delivered to the plaintiff.

Declaration upon a promissory note of the defendant, made payable to Heman Wadham, or bearer. The defendant demurred specially to the declaration, assigning for cause, that it does not appear that the note was ever assigned or *otherwise transferred* to the plaintiff, nor but that it might have been delivered over to the plaintiff merely as agent or attorney for Wadham: and also because it is not averred that the defendant had notice of the delivery of the note to the plaintiff, who sued as bearer.

PER CUR.—We are of opinion that there is no ground for this demurrer; the note is payable to bearer; the declaration avers that the payee delivered it to the plaintiff, who became necessarily the bearer and entitled as such to sue upon it.

With regard to notice: the original promise in the instrument is to pay to the bearer; the right accrues upon the delivery, and the bringing the action is all the notice that is necessary, however reasonable it may seem that the maker of the note should first be made aware of the assignment.

The point has been decided in respect to a note payable to order, in the case of Reynolds v. Davies (1. B. & P. 625.)



## DOE EX DEM. WEST V. HOWARD.

*Intrusion.*

A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the Crown, after grant made, is not a disseizin of the grantee.

On the 10th January, 1833, a patent from the Crown issued to one John Johnson for Lot 24, in the 7th concession of Yonge.

For more than 20 years before the patent issued, Howard, the defendant, and those under whom he claimed, being the proprietors of the adjoining lot No. 23, had encroached upon lot 24, occupying a portion of it adjoining the lot 23. They pretended no right to any part of 24, but, they maintained that the limits of 23 extended to a post or monument, according to which they would have considerably more, and the owner of lot 24 less, than their due quantity of land.

At the time the patent issued Howard was in possession of this piece of lot 24, maintaining that it was part of 23. Johnson, it appeared, was aware of the encroachment when he received his patent: he did not however bring any action to dispossess Howard, but on the 16th of April, 1834, he sold the south half of lot 24 to the lessor of the plaintiff, who was a surveyor, and well knew when he purchased that Howard's possession did not conform to the true limit. The conveyance to the lessor of the plaintiff was by bargain and sale; the description did not mark out the land by any natural or visible boundary, but commencing at the south-east angle of the lot proceeded by courses and distances around the half lot to the place of beginning.

This action was brought to recover possession from Howard of the disputed piece of land.

It was proved to the satisfaction of the jury at the trial before *Macaulay, J.*, at Brockville, that the monument on which Howard relied was not the true monument marking the limits of lot 23, and that according to the original survey lot 24 covered a considerable piece of land of which Howard was in possession. Upon this point there seemed to be no doubt, whatever might have been the opinion of Howard and those from whom he claimed.

The learned judge, however, with a view to legal



objections, which were raised at the trial, requested the jury to say whether the defendant had ousted or disseised the grantee of the Crown (Johnson), knowing that the King's grant was made, and before Johnson conveyed to the essor of the plaintiff.

The jury were of opinion on the evidence that Howard had so ousted or disseised Johnson.

The jury also found that the improvements made on lot 24, by Howard or those who preceded him, were made in consequence of an erroneous survey, which was made before the original Crown survey—and they assessed the value of the land, and the value of the improvements, at the request of the learned judge, supposing that the case might be found to come within the stat. 59 Geo. III., ch. 14, sec. 12.

The jury being satisfied that the tract in dispute was part of lot 24, found a verdict for the plaintiff, and it was left to the defendant to renew in banc. the legal objections which he took at the trial to the plaintiff's recovery.

ROBINSON, C. J.—It has been contended on the part of the defendant that Johnson was disseised by Howard, and therefore on the principles of the common law was disabled from making the conveyance to West.

2ndly. That at all events, having been a year out of possession after his title accrued and next before he executed the conveyance, the statute 32 H. VIII., against buying and selling pretended titles, made the deed to West void.

I cannot agree in either of these positions. When the owner of lot 23 first took possession of part of 24, claiming it as part of 23, he was a mere trespasser upon the lands of the King, who can never be disseised, but in the eye of the law is always in actual possession of his estate—he gained no seizin by this tortious act—and the King, notwithstanding the intrusion, could grant an estate in possession, and his grantee took under the letters patent an estate in fee simple in possession, and was fully and actually seised, notwithstanding he might be put to his ejectment before he could get into actual visible possession of the property. It is of no consequence to inquire whether this adverse possession



had continued more than 20 years, because, the estate being in the Crown the Statute of Limitations did not begin to run until the patent issued.

And with respect to disseizin, I am further of the opinion that if the title to 24 had been in Johnson when the owner of 23 first entered, it would not have been a disseizin under the circumstances, because the encroaching upon an unoccupied lot of land, in consequence of an erroneous survey, or of an erroneous impression as to the true boundary, does not place the person thus encroaching necessarily on the footing of a disseizor, though he is undoubtedly a trespasser. His occupation took its rise in no defiance of another's right; he had no idea of occupying the freehold of the owner of 24; he imagined himself to be on 23, his own land. The grounds upon which I hold this not to be a disseizin have been explained by me in former cases, and particularly I think in a late case of *Denison v. Chew* (5 O. S. 161.)

By the common law I take it that a grantee of the Crown, notwithstanding the continued possession of an intruder on the Crown, who was a mere trespasser, may convey by bargain and sale.

The distinction between being dispossessed and disseised is well explained in *Co. Litt* 152-6, and a man if not disseised is not prevented from conveying by bargain and sale because there is a mere trespasser on his land.

Then as to the statute 32 H. VIII., ch. 9,—did that disable Johnson from conveying simply because he had not been in possession for a year? It is not very easy to obtain precise notions of the intended operation of a statute which in the first instance was passed to meet the evils of a state of society which no longer exists in any country under British law, and which has been for ages so little adverted to that the cases are exceedingly rare in which the statute has been the subject of legal decision. In most treatises upon the law respecting real estate its provisions are but slightly alluded to and in very general terms, and some most respectable and comprehensive works are silent altogether respecting it. Still, undoubtedly, we must respect the statute, and carry its provisions into effect according to



our understanding of them, with such help as we can glean from the few decisions that have taken place. We cannot disregard it as being obsolete, more especially since in this province actions have been sustained upon the statute within our recollection.

In Plowden 77, referred to in the argument, Montague C. J. intimates that the statute has made no change in the common law further than by annexing a penalty. If this be so, then it must follow, that as a person who had not lost the seizin of his estate could convey at common law, the statute, if it was intended to make no change in this respect, was meant only to apply to cases where the holder of the title could be considered as having been disseised, and not to all cases where there has been an adverse possession for a year. In *Doe ex dem. Souter v. Hull* (2 D. & R. 38), Abbott, C. J. observes, "I know of no authority which says that a mere wrongful possession divests the estate of the party against whom the possession is adversely held;" and in the same case Bayley J. says, "In order to bar the power of devising a right of entry, there must be an actual disseizin of the devisor. A mere adverse possession will not suffice; he must be completely ousted of the freehold."

But it seems clear that if the statute had the effect of rendering all conveyances void which are made contrary to its prohibition, it would defeat some conveyances which would not be void at common law upon the ground of the grantor being disseised: because I take it, if a man has been in possession, but not for a year, and his title being contested, he sells for the purpose of maintenance, he would incur the penalty of the statute, and yet being in possession he was capable of conveying at common law.

To hold that in every case in which the statute would subject the buyer and seller to the penalty the deed would be void, is going further than I am at present prepared to do. Of course where the deed would be void at common law, as being made by a person not seised of the estate, it is unnecessary to advert to the statute in determining upon



the validity of the conveyance. Where the deed would not be void upon this common law principle, but we are to determine simply on the ground (which has been established by many modern decisions) that anything attempted to be done in violation of a statute prohibiting it and awarding a penalty, is nugatory as between the parties to such transaction; then, in such cases my opinion is, that we are not to take up with this principle as invariably applicable in all such cases. We must regard the provisions and language of the statute, and we may find something there that clearly discovers the intention of the Legislature, not to make void the act, but to punish the commission of it.

In this case the language of the second clause of the statute is such as to raise a doubt as to the intention of the Legislature in this respect; for it enacts that the buyer and taker of the lands shall forfeit the value of the lands so by him bought and taken—which seems rather to contradict the inference that in such case he takes nothing.

And if nothing passes by the deed in such cases, the effect of the penalties imposed would be this; the estate would remain in the bargainor, who would retain it and the money received from the buyer, being liable, on the other hand, to pay a penalty equal to the value, which would leave him in fact where he was before he made the deed, while the defeated buyer loses the land and his money, which he could not be allowed to recover back in an action, and pays the penalty besides; thereby forfeiting treble the value of the land, though he must be generally the more innocent party of the two. I cannot easily reconcile to myself a construction which would leave things on such a footing.

But in the case before us it seems to me clear that the statute 32 H. VIII. has no application. Howard had only possession of that part of 24 which he imagined formed part of 23; he made no claim to 24. Johnson, on the other hand, was in possession of 24, claiming nothing more than 24, and only not having possession of this part of it because the owner of 23 was in adverse possession, believing and claiming it to be part of 23.



There was no defiance of the right of Johnson to lot 24 intended by Howard; that right was not in dispute. Howard's possession of that part of 24 which he affirmed to be part of 23 cannot be deemed a dispossession of Johnson extending to the whole of 24, but only, at the most, of that part which he occupied, and the possession of that was held in consequence of an erroneous impression respecting the boundary.

To apply the Statute of Maintenance to such a case would be to hold that a person having a lot of land, on which his neighbour has encroached in placing the division fence, must discover the error and dispossess him before he conveys to another, or else that portion, however small, will in case of his conveying the lot become thenceforward a separate estate and held under a different title, and will remain in him notwithstanding his conveyance of the whole lot; so that his vendees or his assigns can never sustain an action against the adjacent neighbor for the small piece of land which he has possessed, in consequence of the boundary never having been correctly ascertained. The statute has never been so applied, though in this province numerous cases have come under the cognizance of this Court, where it ought to have obstructed the plaintiff's recovery in cases turning upon boundary, if the statute did apply upon such facts.

It was in this case, I think, that the trial of a *qui tam* action for the penalty under 32 H. VIII. ch. 9 came on before me at the assizes at Brockville, two years ago, but it seemed to me to admit of no doubt that the action could not be maintained. Johnson simply conveyed lot 24 as it was described to him in his grant from the Crown. The doubt was whether it embraced the piece of which Howard was in possession, and it was contended at that time that it did not, in which case, as Johnson only conveyed lot 24, he could not be said to have incurred the penalty of the statute, merely because it was imputed to him that he intended West should claim under it a piece of land of which he had not been in possession.

With respect to assessing the damages for improvements,



I think the last clause in the statute of 1818 respecting erroneous surveys extends only to cases of error in the original running of the lines, and to the change afterwards made in the possessions of the adjacent proprietors by correcting that error, in conformity to the new principle established by that statute. It was never meant by the Legislature that an error arising from a party's employing an unskilful surveyor, should come under this provision, and more especially when that survey was made (as in this case) before the original Government survey.

I think the verdict for the plaintiff in this case should stand.

I will add, that in my opinion the recent statute amending the law respecting real property makes no change that can affect the decision of this question.

The clause in that statute which relates to the limitation of actions is closely taken from the late English statute.

The object is evidently to quiet possessions by compelling a person having a title, if he ever means to assert it, to assert it within twenty years, and it goes so far in order to accomplish this that it makes even a tenant at will an adverse holder after a year, so that after twenty years, unless something has been done in the mean time to shew that he allowed the right of the landlord, he would gain a title. Notwithstanding this, if before the twenty years a question arises (as, at the end of five or six years) as to the effect of the defendant's possession, that must be decided on the principles of the common law, according to the nature of his occupation, construed by this late act. Such tenant at will is not a disseizor because this statute makes the Statute of Limitations run against him after a year.

SHERWOOD, J.—From the evidence given at the trial, it appears the defendant took possession of the land in question while the legal estate and possession were in the Crown. It also appears the king granted the land in fee to one Johnson on the 10th of January, 1833. The defendant did not prove any license or permission from the Crown to take possession of the premises, but claimed to hold them as part of lot 23, to which I believe he had a legal title. The land in question, however, formed no part of that lot, but



was comprised in the south half of lot 24, which was granted to Johnson. Under such circumstances, I think the defendant must be considered as an intruder on the possession of the Crown when the grant was made to Johnson. Taking that view of the case, it appears to me the legal possession was in the Crown at the time of the grant, and that the King's grant conveyed the same possession to Johnson the grantee. The defendant alleges that Johnson was disseized by him before he conveyed to West the lessor of the plaintiff, and the jury have found that fact. The jury say Johnson was disseized by the defendant. It is therefore necessary to consider whether there was any evidence sufficient to warrant this finding of the jury. In Co. Lit., 277 *b.*, disseizin is defined to be "a wrongful putting out of him that is actually seised of a freehold," and in 181 *a* it is said "that every entry is no disseizin unless there be an ouster also of the freehold."

"A bare entry on another without expulsion makes such a "seizin only that the law will adjudge him in possession "who has the right," "but it will not work a disseizin or "abatement without actual expulsion."—Salk 246. In Co. Lit., 271 *a*, it is also said, "If a man entereth into land "of his own wrong and take the profits, his words to hold "it at the will of the owner cannot qualify his wrong, but "he is a disseizor." A wrongful entry into the land of another and taking the profits seems therefore equivalent to an actual expulsion, and where such person enters generally he will be a disseizor of the fee simple, but if he enter claiming a particular estate, such as a term for years or the like, where there is a particular estate, he will become tenant of that particular estate, and will commit no wrong beyond such estate.—3 Mad., 96, 2 Prest. Con. 321. A tenant for years, by elegit, and some others, may also effect an actual disseizin of the freehold estate by making a feoffment in fee with livery of seizin.

In the case of *Beck ex dem. Fry v. Phillips* (Burr. 2831) Lord Mansfield said, "When you have the right of possession you are not disseized. If you are reduced to a right of action, that is another thing." The King had the



possession and right of possession when he granted the land to Johnson, and the defendant, being an intruder on the King's possession and continuing the occupation without the license or permission of the Crown, could sustain no action of trespass against a stranger for entering on the land. In Bac. Abr. title Trespass, page 656, it is laid down as a principle that, in order to sustain trespass "there must not only be a possession, but it must be a lawful one, for an intruder into land does not gain by the intrusion such a possession as will enable him to maintain an action of trespass *quare clausum fregit*." In support of this position is cited 4 Leon. 184, and Godbolt 133; and although Bayley J., in the case of Harper v. Charlesworth (4 B. & C. 574,) upon the authority of a case in Aleyn 10, 11, seems to think an intruder may sustain an action of trespass against a stranger, still the case then before the Court was decided in favor of the plaintiff, on the ground that he was not an *intruder*, because he held the possession with the consent of the Crown. The law, therefore, as stated by Bacon, is undoubtedly correct, because it is consonant with all the cases which are now considered as authority.

I think it was necessary to establish a disseizin in this case, to prove that the defendant, claiming the estate in fee, entered upon the possession of Johnson and expelled him, or that he entered upon his possession, so claiming the freehold, and took the profits of the land.

It is not at all pretended that a disseizin took place by means of a feoffment; and consequently, if there were a disseizin, it must have occurred in one of the two ways just stated—namely, that the defendant entered upon the possession and expelled Johnson, or entered upon his possession and took the profits against his will and consent, and professing to be the owner himself. The facts of the case shew that no disseizin took place in either of these ways. The defendant entered upon the possession of the King and continued there after the Crown granted the land to Johnson, therefore no disseizin followed the



occupation of the land of the defendant, for the King cannot be disseised; and I incline to think no disseizin was occasioned by the tortious continuance of the first occupation, because the defendant or those under whom he claims never entered upon the possession of Johnson, but upon that of the Crown. Their entry amounted to a wrong, but not to a disseizin, and its character, I think, has not since been changed by any act of the parties during the continuance of the defendant having first occupation.

As Johnson was not disseized of the land, he continued to hold the possession in law by virtue of the King's patent, and might well convey the freehold by the deed of bargain and sale, which he executed to the lessor of the plaintiff, unless the statute 32 H. VIII. ch. 9, sec. 2, against buying or selling pretended rights or titles to lands, would prevent him.

That statute enacts, that no person or persons whatsoever "shall bargain, buy or sell, or by any ways or means obtain, get or have, any pretended right or titles; or take, promise, grant or covenant to have any right or title of any person or persons, in or to any manors, lands, tenements or hereditaments (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made); upon pain, that he that shall make any such bargain, sale, promise, covenant or grant, to forfeit the whole value of the lands," &c., "and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands," &c.

The act imposes a penalty in two instances upon the sale of the title to lands by any person who has not been in possession of the same, or of the reversion or remainder thereof, or of the rents or profits, either by himself or through the agency of those from whom he claims, for the space of one whole year next before the sale: 1st, When the vendor has only a pretended title; 2dly. When he has a valid title.



As the act expressly prohibits the sale of land by a person out of possession, I incline to think that, when the vendor is once liable to the penalty, the deed which he gives to evidence the title must be void in law. In the case of *Bartlett v. Vinor* (Carth. 252,) Holt C. J., observed, "Every contract made for or about any matter which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." In the case of *De Begnis v. Armistead* (10 Bing. 107), the doctrine of Lord Holt is fully recognized, and that case was determined on the same principle. In *Comyns v. Boyer* (Cro. Eliz. 485) the Court held otherwise, but that case is decidedly overruled in *Drury v. Defontaine* (1 Taunt. 131.) Mansfield C. J. observes, in allusion to the case of *Comyns v. Boyer*, "the Court determined that the holding a fair on that day would be illegal, but the contract would not be void. The law is since changed, and if any act is forbidden under a penalty, a contract to do it is now void."

As the statute 32 H. VIII. ch. 9, sec. 2, not only prohibits sales of titles to lands where the vendor is out of possession, as mentioned in that act, but also inflicts a penalty for making such sale, the conveyance by which the sale is effected seems necessarily to be a nullity, conformably to the decisions just cited.

It appears that the King granted the land in question to Johnson on the 10th of January, 1833, and he conveyed to the lessor of the plaintiff in April, 1834, more than a year after the date of the patent from the Crown. The question then is, whether he was in possession when he conveyed; for it is quite clear that, after the patent issued to him, the Crown was out of possession, and therefore the possession must have been either in the defendant or in Johnson. I have already alluded to this point in considering whether there had been a disseizin by the defendant, but it now becomes necessary to enter into the subject with more particularity. It is a maxim well established in law that



the King cannot be disseised—10 Co. 112, in Legat's case, where the old authorities are cited. A man cannot be indicted for a forcible entry into the possession of the King, because the King cannot be disseised—Dalt. Just. 303. The following passage in 6 Bac. Abr., "Prerogative" E. 6, seems to me conclusive to shew that Johnson was not disseised: "There can be no tenant at sufferance against the King, but he who holdeth over is an intruder; because no laches can be imputed to the King for not entering. Therefore if the King be seised in fee of the manor of B., and a stranger erect a shop in a vacant plot of it, and taketh the profit without paying any rent to the King, and afterward the King grant over the manor in fee, and the stranger continueth in the shop and occupy it as before, this is no disseizin; for the first entry of the stranger was no disseizin, but an intrusion on the King's possession; for that the King's title appearing on record the entry *in pais*, which is not an act of equal notoriety, will not divest it out of him. If then the King is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it, and consequently cannot be said to be disseised by the stranger, who has made no entry on him after the King's conveyance, but only continued the old interest, which he had before the grant; and so remains an intruder still, and liable to an action of trespass or ejectment for it."

The King's patent to Johnson had the same effect in law to convey the estate as a deed of feoffment from one subject to another without livery of seisin—Barwick's case, 5 Co. 93.; Bac. Abr., title Prerogative F. 3; Plow. 232; and therefore it will be proper to examine how a feoffment with livery of seisin operates. It is clear that it transfers the property and the possession to the feoffee at the same time—4 Cruise, 103. Johnson therefore had both the property and possession in April, 1834, when he conveyed to the lessor of the plaintiff, and might have sustained trespass or ejectment against the defendant.

If the freehold had been in a private individual and not in the Crown, when the defendants entered on the land, I



incline to think that, even in that case, there would have been no disseizin occasioned by the entry and occupation of the defendant. According to the opinion of Lord Ellenborough, in 12 East 141, "disseizin imports an ouster of the rightful tenant from the possession and occupation of the freehold tenure;" and in 3 Price 575 it was held that an entry is not a disseizin in fact, unless it be forcible, or with a manifest intention to disseise.

In my opinion, the taking possession of land without claiming the estate is a mere act of trespass, and is considered in this light by Abbott, C. J., in 2 D. & R. 41, where he says, "I know of no authority which says that a mere wrongful possession divests the estate of the party against whom the adverse possession is held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment."

The premises claimed by the lessor of the plaintiff are a part of Lot No 24, to which the defendant had no claim whatever, but he entered into the possession of it erroneously, and supposing it formed part of Lot No. 23; and I think it a fair inference to be drawn from this fact, that he would never have taken possession had he known the land was a part of a lot No. 24, to which he pretended no title or claim. He was undoubtedly mistaken in his opinion of the locality of his land. How then can it be alleged that he intended to usurp the freehold in lot No. 24, when in fact he intended to take possession of a part of lot No. 23 and not of 24?

In no possible view of the case, therefore, can it properly be alleged there could have been a disseizin under the circumstances in which the defendant took possession, whether the King or a subject had the estate in the land. If Johnson were not disseised, then he had the possession, notwithstanding the wrongful act of the defendant in going upon the land through a mistake of the boundaries of the lot which he claimed, but not, as it appears to me, with the intention of claiming the freehold in any other lot.

Another question remains to be determined, before the



lessor of the plaintiff can enter a judgment on the verdict rendered in his favour—namely, whether the defendant is entitled by law to claim compensation for the improvements made by him while in possession of the land. This must depend on the construction of the 59th Geo. III. c. 14, which directs in what manner the division lines between lots shall thereafter be ascertained. The line which misled the defendant does not appear to have been run by a licensed surveyor, and was run before the passing of that act. These facts, in my opinion, do not entitle the defendant to any damages. The 12th sec. of the statute in substance enacts, that when any action of ejectment is brought by any person who, after the lines have been established by virtue of that act, shall be found to have improved on lands not his own, in consequence of unskillful surveyors, such person shall have a right to be made good for any loss which he sustains from having made improvements on the land, to the extent of what the jury who are empannelled to try the case may think reasonable and proper under the circumstances of the case.

This statute prohibits all persons from acting as surveyors of land without being licensed by the Governor of the Province; it also requires, that all chain bearers employed by the surveyor shall be sworn to a correct performance of their duty; it likewise establishes a general system of astronomical and mathematical operations to discover the true course of all lines dividing lots, as well as the correct mode of tracing them to their proper extent. The act is compulsory on all licensed surveyors to produce division lines conformably to rules established by the Legislature; and it appears to me it was not intended to allow any compensation for improvements made in consequence of erroneous surveys, unless they were made by persons acting under the authority of the Government, since the framing of the law.

Every one has a right to suppose that surveyors appointed according to the law are competent to the performance of their duty; but if there should be any instance to the contrary, then it is but reasonable that those who are misled by the



erroneous proceedings of such authorized officer should not sustain an injury in consequence of employing him. The same principle, however, is not applicable to those who make improvements conformably to the division lines produced by unauthorized surveyors, because they must be supposed to employ such persons on their own responsibility, and must therefore look to them for the consequences of their errors, and not be allowed to claim damages under a statute whose policy clearly forbids them to employ such unlicensed surveyors.

To allow damages in this case to the defendant would contravene, in my opinion, the intention of the Legislature; and therefore I am against their allowance. The facts of the case shew that the surveyor employed by the defendant must have been incompetent to the correct performance of his duty; but even if he were a skilful surveyor and had been licensed, still, as the act is altogether prospective in its enactments, this case would not be found within its scope and provisions.

MACAULAY, J.—It is said no disseizin can take place, except where the original entry constituted it, and, consequently, that the continuance in possession, by those who were intruders upon the King, after the grant to Johnson, would not amount to a disseizin: but, notwithstanding this rule, it appears to me that there was sufficient evidence to go to the jury to admit of their finding an ouster of the King's patentee, from any constructive possession which the operation of the letters patent may be supposed to have imparted to him. It did not appear that he had actually entered into any part of the lot granted at any time previous to the conveyance to West; or, that such conveyance was executed on the premises: but the evidence warranted the inference that the defendants, knowing of the grant, persisted in holding the disputed tract, adversely to any right that could be asserted under it; not inadvertently, under a misapprehension of the true boundaries, but pertinaciously and wilfully, and intending to deny, controvert and dispute any such right—in other words, adversely: so



that Johnson was, in point of fact, out of possession upon an adverse holding at the time he conveyed to the lessor of the plaintiff, to the extent of such adverse possession. I think the deed was inoperative, as being a sale of a right of entry only, and in contravention of the statute 32 H. VIII., ch. 9. I think that, as respects the tract in question, the Statute of Limitations was running against Johnson on the 16th of April, 1834, when he executed the deed under which the lessor of the plaintiff claims; and that the latter knew of the adverse possession and intrusion of the defendant, and purchased with the intention of contesting the point of boundary with him.

The act amending the law of real property was passed on the 6th of March previous, and by sec. 16 it was enacted, that "no person shall make an *entry* or distress, or bring an action to recover any land, or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to any person through whom he claims."

Sec. 17 enacts that "the right to make an entry, or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereafter is mentioned; that is to say: when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession, or in the receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession:" and, that "when the person claiming such land or rent shall claim in respect of an estate or interest *in possession*, granted, appointed, or otherwise assured by any instrument, other than a will, to him or some person through whom he claims, *by a person being, in respect of the same estate or interest, in the possession or receipt* of the profits of the land, or in receipt of the rent, and no person entitled under such instrument shall have been in possession or receipt, then such right shall be deemed to



have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt, by virtue of such instrument."

Assuming that Johnson acquired a constructive possession by virtue of the patent, the adverse holding of the defendant would, I think, bring the Statute of Limitations into operation before April 16th; in other words, that, as respects such statute, his right of action accrued antecedently, by reason of his having been dispossessed, or discontinued such possession, owing to the adverse holding of an adverse claimant. Under such circumstances, he could not convey. The following parts of the same section evince that no one was deemed competent to convey, in the circumstances of a case like this, unless in possession, actually or constructively. If the deed to West was valid, his right of entry would, clearly, have accrued immediately upon its delivery, and yet the statute only speaks of a person claiming in respect of an estate in possession, granted by an instrument by a person being, in respect of the same estate or interest, in possession, or in receipt of the profits or rent; and it cannot be said that the lessor of the plaintiff claims under an instrument executed by a party so in possession. It was not supposed, that one out of possession, or one against whom the Statute of Limitations was running, upon an adverse holding, could convey a right of entry at all; and, consequently, no provision is made for such a contingency. If I could treat the possession, long held by the defendant and those under whom he claims as a mere inadvertent encroachment or occupation—a holding under a misapprehension—I should concur with the opinion of the majority of the court; but I cannot view the facts and the nature of the long possession in that light.

Judgment for plaintiff—*Macaulay, J.*, dissenting.



## HONSBERGER V. HONSBERGER ET AL.

*Legacy—Will—Assent of Executor—Trespass.*

The assent of executors to a legacy may be by implication as well as by express words, and in this case it was held to be sufficiently shewn by their conduct. Where the testator devised his house to his wife for life, and also left her some personal property; and the executors, in her absence, entered the house to make an inventory of the property, and afterwards turned out her daughter and shut up the house:

*Held*, on trespass brought by the wife, that this was sufficient proof for the plaintiff, under an issue joined upon the fact of excess.

This was an action of trespass, tried at the last assizes for Niagara. A verdict was rendered against two of the defendants for £25 damages. A new trial was moved for, on the ground that the verdict was against law and evidence. The declaration was in trespass for entering the close and damaging the gates, &c., with a count for the expulsion of the plaintiff from her dwelling-house, and a count for taking goods, &c.

The defendants pleaded—1st, the general issue; and, 2ndly, the defendants (excepting one of them, Fritz), to the first, second, and third counts pleaded specially that one John Honsberger was seised of the premises, and made his will, leaving Mayer and Honsberger (two of the defendants) his executors, and that they, being executors of the will, with Clark and Fritz as their servants, entered on the premises to make an inventory of the goods, and did make such inventory, and afterwards sold the goods, except certain articles enumerated, which the testator bequeathed to the plaintiff, and which they left in the house for her. The plaintiff to this special plea replied excess of force, &c., in doing what defendants justified; on which the four defendants joined issue. At the trial before Mr. Justice Sherwood it was proved that John Honsberger made his will on the 25th of March, 1834, ordering his debts to be paid from his personal estate, and bequeathing to his wife, the plaintiff in this cause, his bed and bedstead, and furniture thereunto belonging, one cow, and the dresser, *with all the kitchen furniture therein and thereon;*” and further devising to the plaintiff the house he lived in, and the lot belonging to it, during her



widowhood; but if she should marry again, or leave the premises, she should have no right or claim to them. The will proceeded—"Item.—I give, further, unto my said wife two iron pots and teakettle, and the stove, only for the time she remains my widow;" and, after various other dispositions, he left the money arising from his property, real and personal, to be divided among his children. Mayer, and Samuel Honsberger his son, two of the defendants, were made executors.

In June 1834 Honsberger died, and was buried on the 16th of June. At the time of his death the plaintiff was absent, having gone to see a daughter who was ill, and left a daughter of her own in the house with the testator, who was her second husband. She went on the 2nd of June, and the testator died on the 14th. On the 16th of June, after the funeral, the executors went to the house and desired the daughter to leave it, but afterwards told her if she staid she would be responsible for the things. They appraised the goods; the daughter left the house, and they fastened it up, and on the next day sold some of the things, among them some of the bedding belonging to the testator's bed and bequeathed to the plaintiff, and several articles of kitchen furniture, but nothing, as it seemed, that was *in* or *on the dresser*.

It was contended for the plaintiff that the defendants in their rejoinder admit that they assented to the bequest of the goods, for they say *they left those* as having been given to the plaintiff by the will; but the plaintiff alleges that they committed a wrong in expelling her daughter from the house and locking it up, in selling her bedding left to her, and in selling many articles of kitchen furniture which she claimed under the will.

The learned judge ruled at the trial that the defendants by the plea admitted their assent to the bequest; and that the will gave all the kitchen furniture (not merely that on or in the dresser), except that it gave no more pots or teakettles (if there were more) than the number mentioned in the will, because the number of these was limited.



The defendants moved for a new trial, on the ground of the verdict being against law and evidence, and for misdirection.

ROBINSON, C. J.—It is clear that this plaintiff could bring no action of trespass for taking the goods bequeathed to her until the executors had assented to the legacy; but that assent need not be in express words; it may be implied from the conduct of the executors; and I think the executors are shewn clearly to have been willing that the plaintiff should have the articles, which, as they understood the will, were bequeathed to her.

My construction of the will agrees with theirs—that is, I think the testator did not bequeath any kitchen furniture not on the dresser, except the articles enumerated—viz., the pots, kettles, &c. I believe, however, that the other articles in the kitchen which the plaintiff claims under the will, but which I think were not intended to be bequeathed, were of small value; so that we cannot conclude that the jury gave any large proportion of the damages on their account—supposing the mto have adopted the more liberal construction, as I presume they did, in accordance with the opinion of the learned judge at the trial.

Then we have to consider that, under the pleadings in this cause (which are loosely framed), if any trespass was done to the freehold it is admitted to have been justified for the special cause alleged, except that an excess of force and violence is complained of, unnecessary for the object in view, which is admitted to have been legal. Upon the special pleading, the excess alone is in issue. Now, as to that, I apprehend that there was an excess in fastening up the door of the plaintiff's dwelling-house, in which she had a life estate, and which I look upon as in her possession; for her daughter and servant was living in it, and would have continued there but that she was constrained to depart by the defendants, and then, the house being made vacant by their improper act, that circumstance is advanced as a reason for nailing up the door, and thus excluding the plaintiff from her own dwelling-house.



Then, again, if the defendants took any goods which were bequeathed to the plaintiff, they are not included in the special justification, but the defendants defend for these under the general issue alone. The evidence otherwise fully sustains a recovery on account of bedding bequeathed by the will, though there is some contradictory evidence; and as I think a verdict for the plaintiff is supported by the testimony, I am not in favor of any interference with it, on the ground that the damages are higher than the exact injury proved. The action is trespass; the verdict is for £25—not an extravagant sum; and I must say, that, so far as the evidence on the judge's notes enable me to judge, the conduct of the executors was most harsh and even indecent, and I cannot wonder if the jury felt it right to mark their sense of this by giving rather liberal damages.

Rule discharged.

#### LESSLIE V. LEAHY.

*Bond—Profert.*

When a bond is pleaded with a *profert*, the admission of its execution under a judge's summons for that purpose does not dispense with the necessity for its production at the trial, but only with the necessity of proof of execution.

In this case a bond was declared on with *profert*. Oyer was demanded and *non est factum* pleaded. Upon a judge's summons under the rule of court, the defendant gave a written admission of the execution of the bond. After issue had been joined the bond was lost, and could not be produced on the trial. The defendant objected that upon the record as it stood its production could not be dispensed with, and contended for a nonsuit. The plaintiff had a verdict, and a new trial was moved for on this objection.

*Bidwell* shewed cause, and maintained that the admission of the execution of the bond had rendered its production unnecessary.

The court determined that it had not that effect; that it only dispensed with the necessity of proof of execution, and that, under the circumstances, the plaintiff should have moved to amend before the trial, striking out the *profert* (1 Esp. 337; 5 East. 485; 1 Stark. N. P. 74), and the rule was made absolute.

Rule absolute.



## DOE EX DEM. GRAY V. ROE.

Service of a declaration in ejectment on any person but the tenant or his wife is insufficient, unless it can be shewn that the declaration came to the tenant's knowledge before the first day of term.

*Duggan* moved for a rule for judgment against the casual ejector, on an affidavit of service stating that the declaration was delivered, on the 3rd of February, to a young boy, a step-son of the tenant, on the premises—the tenant (Gray) and his wife being from home—and that the notice and meaning of the service were explained to the boy; that on the 4th of February the tenant's wife informed the bailiff that she had received the declaration and notice; and he then explained to her the declaration and notice, and meaning of the service.

The court refused the rule, saying that it ought to appear that the husband had returned home, so that the wife could have made the service known to him in time for making his defence. Service on the wife is sufficient when the presumption can be safely entertained that she communicated the service to her husband; but here it is shewn that the husband had left his home, and it is not shewn that he ever returned.

Rule refused.

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PHILLIPS V. ODELL.

In case for slander, words stated in the declaration as if narrated by the defendant in the third person, are not supported by proof of words spoken by him in the first person.

This was an action for slander. A verdict was found for the plaintiff, subject to the opinion of the court on the following ground of non-suit moved at the trial. The words were laid as relating in substance what the defendant said, instead of stating the words, thus :—"that he, the defendant, had no doubt the plaintiff did it" &c., instead of laying the words as it was proved the defendant uttered them, viz : "I have no doubt he did it," &c.

The court were of opinion that the words proved did not sustain the declaration, and that it was not permitted to a plaintiff to give by way of narration the effect of the words,



instead of the language used. They referred to the case of *Cook v. Cox*, 3 M. & S. 110, where a like objection prevailed in arrest of judgment.

Rule absolute for non-suit.

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PLUMB V. MILLER.

An attachment will not be granted on the order of a judge at Nisi Prius, until such order is made a rule of court.

The trial of this cause had been put off at Nisi Prius for the absence of a material witness, on the usual condition of paying costs.

The defendant failed to pay them, and *O'Reilly* moved for an attachment on affidavit of nonpayment.

The court said he might move to make the order of the judge at Nisi Prius a rule of this court, and then on affidavit of demand and nonpayment it might be proper to grant an attachment, though in some cases the right to an attachment is questioned.—2 Chit. Rep. 158; *Mynde's case*, 1 B. & P. 39; *Stra.* 1220; *Barnes*, 283; 7 T. R. 6.

Attachment refused.

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DOE EX DEM. SHANNON V. ROE.

A. having purchased a lot of land and paid several instalments of the purchase money, but having received no deed, assigned his right to B., taking a bond from him, that if he should obtain the deed, on the payment by A. to him of £130 in two years, he would convey the land to A.

*Held* on ejectment brought by B., the two years having expired, that A. could not treat the bond as a mortgage, and redeem on the payment of the principal, interest and costs, under 7 Geo. II., ch. 20.

One Hewson contracted to buy the premises for which this action was brought from the Canada Company, and made payments on account. Unable to pay the residue, he borrowed £130 of Thompson and Shannon, and to secure them, gave up to them his contract with the Canada Company, and released his claim to the lot, that they might obtain a title in their own name, taking back a bond from them to make a deed of the land to him provided he should pay the £130 and interest in two years, and in the mean time Hewson was to retain possession.



A deed was obtained from the Canada Company, and Shannon therefore owned the lot. The two years expired on the 20th of January last, and he brought this ejectment to gain possession.

Hewson moved, under 7 Geo.-II., ch. 20, to stay proceedings on payment of the debt, interest, and costs, as if this were a case of mortgage.

But the court said this was not a case within the statute. There was no mortgage of an estate here, for the supposed mortgagor has no legal estate. He was not a person *having the right to redeem*, for he had mortgaged nothing. All rested in contract; no legal estate had passed from him to Shannon and Thompson.

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#### PELTON V. ADMINISTRATORS OF WELLS.

When an attachment was obtained against a sheriff for not returning a writ after a settlement of the plaintiff's claim before the rule issued, the attachment was set aside, but without costs, as the sheriff should have come in and applied to set aside the rule.

An attachment had been ordered against the sheriff of London for not returning the *fi. fa.* in this cause.

It was granted upon the ordinary affidavits. Now the sheriff moved to set aside this attachment, on these grounds: The *fi. fa.* (against lands) was delivered to the sheriff on the 12th of June, 1834, and the lands of defendant were advertised to be sold on the 15th of September, 1835. The plaintiff attended and bid off at the sale sufficient lands to pay the debt, and on the same day gave the sheriff a discharge in full of the execution. On the other side it was shewn by affidavits filed that the plaintiff Pelton had assigned this debt to one Long before the sale, and that this discharge, given afterwards by him, was without the knowledge of his attorney or of Long. But it did not appear that the sheriff had any notice of the assignment of the debt, nor any knowledge that the plaintiff was not entitled to the proceeds. Moreover, it was not shewn that Pelton had executed any assignment of the judgment.

The court set aside the attachment against the sheriff, but without costs, because he might have moved to discharge the rule for returning the writ, and ought not to have lain by until the attachment was ordered.



## DOE EX DEM. LEMOINE V. VANCOTT.

When a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession.

But where the defendant went to the heir and offered to pay him the money due on the bond, and to take a deed from him as heir, it was held that by such conduct he had waived his right to a demand.

Ejectment for one hundred acres of land in Thurlow.

In May 1802, a patent for this land issued to Joseph Lemoine, son of Henry Lemoine.

At the trial at Kingston, before Macaulay J., the lessor of the plaintiff proved himself to be heir to Joseph Lemoine.

For the defendant it was proved, that on the 18th May, 1814, Joseph Lemoine, being then a minor, contracted with one Holsted to sell him this land for £50; that Holsted made some payments to him on account, and took a bond from Joseph Lemoine in the penalty of £100, conditioned to convey the land to him, provided he should pay £17 9s. 2d. on the 15th of February 1815, with interest. Not long after this, Joseph Lemoine died, being still a minor. Holsted had been put into possession by him, and went to make the payment according to the condition of the bond, but learned that he was dead. He tendered the money to his administrator, who refused to receive it. Not long after this Holsted sold out to the defendant, but gave him no writing, and it was understood that the defendant was to run all risks.

The defendant continued to reside on the property until the lessor of the plaintiff, a year ago, came out from England and asserted his claim as heir. The defendant offered to pay him the money that would be due on the bond; but he declined recognising the sale made by Joseph Lemoine.

The demise was laid on 1st January, 1826.

It was objected that, under these circumstances, a demand of possession was necessary before the heir could treat the defendant as a trespasser, and that no demand was made before the time of the demise laid.

2ndly, That the possession of more than 20 years in Vancott and Holsted barred the action under the Statute of Limitations, and that the lessor had not shewn that he came within any exception in the statute. It was merely stated that he



was born in Lower Canada, and not shewn at what time he first came to Upper Canada.

ROBINSON, C. J.—With regard to the attempt to set up a title under the Statute of Limitations, it must clearly fail, because it is shewn how the possession commenced, and it was not adverse. Holsted went in under an agreement of purchase ; and besides, the defendant has acknowledged the title of the lessor of the plaintiff.

I have had much doubt upon the point respecting the necessity of demanding possession before the defendant could be treated as a trespasser—that is, before the time of demise laid in the declaration. Joseph Lemoine, while an infant, contracted to sell this estate to Holsted, and put him in possession, and gave him a bond to convey, upon his making certain payments.

Since the statute which protects an obligee against the penalty, it has been doubted whether a bond with a penalty might not be good against an infant, in any case in which he could bind himself by a single bill, since they are in effect the same.

And with respect to a bond like this, to convey land, executed by an infant, undoubtedly it is voidable at least, if not void ; but as the infant, on coming of age, might ratify it, I have no doubt that Joseph Lemoine, if living now, after having given such a bond and having put Holsted in possession, and received part of the purchase money, could not bring ejectment till he had first demanded of him to give up the possession. Upon the principle of the case 13 East. 210, the court would not permit it. Whatever equity entitling him to demand of possession Holsted would have had, I think Vancott would have, as receiving the possession from him with the bond specifying a consideration for it.

Then the next question is, whether Lemoine's heir would be under the same necessity of demanding possession that Joseph Lemoine would be, if living. I am of opinion that he would equally have to demand possession, although any supposed tenancy at will under Joseph Lemoine, arising out of the transaction, would of course be put an end to by his death.



That single consideration, I think, would not be decisive of the question. But I do not dwell upon this point, because it is my opinion that Vancott having been proved to have offered to the lessor of the plaintiff to pay him the sum remaining due on the place, and to take a deed from him as heir—thereby recognising him as heir—and having, notwithstanding afterwards at the trial so far disclaimed to hold under him as to dispute his pedigree, and endeavour to make out a title in himself under the Statute of Limitations, he cannot be received, I think, to urge an objection that possession was not demanded. If he meant to defend himself under a right of possession consistently with the plaintiff's title, he should have acted consistently, and not set him at defiance on other grounds. For this reason I think the plaintiff was relieved, by the course the defendant took, from proving a demand of possession; wherefore, the verdict for plaintiff should stand.

Judgment for the plaintiff.

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KING V. LATHAM.

The gaol limits of the city of Toronto do not include the liberties of the city.

The defendant was security to the sheriff for a debtor in execution at the suit of the plaintiff, King, and admitted to the limits of the gaol of the Home District.

The escape or withdrawing from the limits was denied in the pleadings, but upon the trial it was shewn and admitted that the debtor had gone beyond the limits of the City of Toronto, though he had not gone out of the city and liberties. The house in which he had been frequently seen was in the liberties.

It was submitted as a question for decision, whether the limits of the gaol of the Home District do or do not include the liberties of the City of Toronto.

ROBINSON, C. J.—This question is one of some interest, but it turns upon a single point, and that too plain, apparently, to admit of much argument.

By statute 4 Wm. IV, ch. 10, it is enacted that the limits of the respective gaols in any town in this Province shall be co-extensive with the limits of the several towns in which such gaols respectively are situate.



By the statute passed in the same year, extending the limits of the town of York, and erecting it into a city, a certain tract described by metes and bounds, and comprehending what before was the town of York, and considerable territory in addition, is made and constituted the City of Toronto, and is divided into five wards. Then a large space beyond and around these wards is constituted the liberties, and provision is made for attaching these liberties to the nearest wards for the present, and for annexing them to the city hereafter under certain circumstances. In short, nothing is plainer than that the city and the liberties are distinct; and as the gaol is in the city of Toronto, the bounds of the city (which is not now less a town than it was before) are, according to the provisions of the Gaol Limits' Act, the limits of the gaol. In very many places in the act incorporating the city, the distinction between the city and liberties is kept in view, and when it is intended that any provision shall extend to both, it is so stated, as for instance in stating the jurisdiction over offences committed within the city and liberties. It would be repugnant to hold that a debtor is within the city when he is in no one of the wards into which the whole city is divided.

We are of opinion that this rule for non-suit should be discharged. Rule discharged.

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### TAYLOR V. TAYLOR.

#### *Practice—Points reserved.*

When points are reserved at a trial and endorsed on the record, but the judge makes no entry thereof on his notes, the record must govern, and judgment cannot be entered until the points are disposed of.

In this case a non-suit was moved for at the trial, upon a point which the learned judge did not then dispose of, leaving it to be discussed in banc.

The notes of the trial having been read, and it not appearing by them that the point had been reserved, and no motion being made within the first four days of the following term, the plaintiff entered his judgment; but upon the



Nisi Prius record the verdict was endorsed as rendered, subject to a point reserved.

The court said this entry upon the record must govern. The omission to state in the notes that the point was reserved was probably accidental, and the defendant would naturally rely on the endorsement appearing on the record.

A rule nisi, which had been obtained for setting aside this judgment for irregularity, was therefore made absolute.

Rule absolute.

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### EASTER TERM, 7 WM. IV.

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#### MCPHERSON AND OTHERS V. HAMILTON.

*Escape—Liability of new sheriff for escapes at the time of his appointment—  
Nonsuit, although pleadings supported by evidence.*

On the death of a sheriff his deputy is charged with the execution of his office until a new sheriff is appointed, and he must assign over by indenture as well the debtors on the limits as those in custody; and a new sheriff is not liable for the escape of a debtor on the limits, at the time of his appointment, without such assignment.

A plaintiff may be nonsuited although his evidence supports his pleadings.

The plaintiff brought debt for escape of one Mosier, a prisoner in execution.

The first count stated the judgment against Mosier at the suit of the plaintiff in this action; that a writ of *ca. sa.* was sued out and indorsed to levy &c., and was delivered to Leonard, the former sheriff, who arrested Mosier thereupon, before the return, and had him in custody until his (the former sheriff's) death; that one Kidd was deputy of Leonard before and at the time of his death, and that he had Mosier in his custody, as such deputy, after the death of Leonard, under the said writ, until this defendant afterwards was appointed sheriff; that Kidd, as such deputy sheriff, *duly delivered over the body of Mosier* so charged as aforesaid to the defendant, who had him in his custody for the cause aforesaid, until defendant voluntarily suffered him to escape.



The second count stated that Mosier after being arrested by Leonard obtained the benefit of the gaol limits, and continued on the limits until the death of Leonard, and from thence continued on the limits in the custody of Kidd, his deputy, until defendant was appointed sheriff; that the defendant, as &c. succeeded Leonard as sheriff, *whereby he had Mosier in his custody* upon the limits, for the cause aforesaid, and kept him in custody till &c., when he voluntarily permitted him to escape.

The third count stated the arrest of Leonard; that Mosier obtained the benefit of the limits and continued thereon in Leonard's custody until the death of Leonard, and afterwards in the custody of Kidd until the defendant's appointment, *of which defendant had notice—by means whereof* defendant had him in his custody, and had and detained him in his custody aforesaid, until &c., when he voluntarily permitted him to escape.

The defendant pleaded—First, *Nil debet*.

Secondly, to the first count, traversed the delivery over by Kidd of the prisoner into the defendant's custody.

Thirdly, to the first count, traversed the allegation that Mosier was in the defendant's custody at the suit of the plaintiffs.

Fourthly, to second count, traversed the allegation that Mosier, while in Leonard's custody, obtained the benefit of the limits &c.

Fifthly, to second and last counts, denied that defendant had Mosier in his custody upon the limits by virtue of the writs mentioned.

Sixthly, to the second and last counts, that defendant discharged Mosier from custody on the limits by assent of the plaintiffs.

Upon the trial, before *Robinson, C.J.*, at the last Autumn Assizes for Toronto, the defendant failed in establishing the defence stated in his last plea—namely, the discharge of Mosier by assent of the plaintiffs. He attempted to prove the written assent of one of the plaintiffs, but he could not produce the letter in which he said it was contained, and did not entitle himself to give secondary evidence of its



contents. The learned Chief Justice therefore directed the jury that the plaintiffs were entitled to their verdict upon that issue. But the case mainly turned upon the objection that the plaintiffs did not shew Mosier to have been in the defendant's custody upon the execution, which, of course, formed a necessary part of the plaintiffs' case upon the issue of *nil debet* pleaded to the whole declaration, and which was moreover expressly denied in special pleas applying to the several counts.

No evidence was given of any indenture or schedule by which the defendant Hamilton received the prisoner Mosier from Kidd the deputy, who held the office between the time of Leonard's death and the defendant's appointment. On the contrary, the indenture was produced by which Kidd, on his going out of office, assigned to the defendant the prisoners said to be in his custody, with the cause of their detention, being six in number. In this formal instrument, sealed by both parties, no mention was made of the prisoner Mosier, and it was proved that no other indenture or assignment was executed.

It was admitted that the defendant knew Mosier to be on the limits, but in what manner, or from whom he received the information, was not shewn, nor whether he had any knowledge of the process on which Mosier was detained.

Kidd swore that he had no knowledge that the bond which Mosier had given for the limits was ever handed over to the defendant, and that he could not account for Mosier's name not being included in the assignment.

It was the Chief Justice's opinion at the trial that Mosier, under these circumstances, was not in the defendant's custody, and he directed a verdict for the defendant, with leave however, by consent of the counsel on both sides, reserved to the plaintiffs to move to enter a verdict for the plaintiffs for £328 15s., the amount of the debt, provided the court should be of opinion that Mosier was legally in the defendant's custody, and a rule was accordingly moved for on behalf of the plaintiff in Michaelmas Term, which was argued last term.



ROBINSON, C. J., delivered the judgment of the court.

We think it quite clear that the rule nisi which has been granted must be discharged, and that the defendant must be allowed to enter judgment on his verdict. When the old sheriff is living at the time of the new sheriff succeeding, it is certain that the new sheriff, upon the principles of common law, is not chargeable with the custody of prisoners detained in civil process, until they are delivered into his charge by assignment of the old sheriff, which assignment is usually by indenture specifying the cause of detention of each prisoner.

Before the passing of 5 Geo. I. ch. 15, by the 8th section of which the deputy of the deceased sheriff is to continue in office until a new sheriff is appointed, a different principle was recognised when the office became vacant by death—and in such case the new sheriff, it appears, was bound at his peril, without delivery or notice, to take notice of the prisoners in the gaol and of the causes of their commitment.—Westby's case, 3 Co. 72; Cro. Eliz. 366; Sid. 335; Noy, 51; 2 Leon 54; 2 Keb. 224; Cro. Jac. 380; Barnes, 367; B. N. P. 68.

But, since that statute, the necessity which introduced this distinction does not exist—the deputy is authorised to do all that should be done in the name of the preceding sheriff; and in this case he plainly understood that it was his duty to deliver over the prisoners in form; and his omission to notice Mosier, or to apprise the new sheriff of his detention or the cause, or to put him in possession of the bond given for the limits, disables us from saying that Mosier was ever in the defendant's custody. A parol notice by Kidd to the defendant might perhaps have sufficed, but there is no proof of any notice whatever given by Kidd, and though it is admitted that the defendant did in fact know Mosier to be on the limits, it is not shewn that he knew upon what account he was there.

It is hardly necessary to say that an escape from legal custody is the very essence of the action. If the prisoner was not in the defendant's custody, the defendant could not have suffered him to escape. It has been argued that the second and third counts are so framed as not to require fur-



ther proof than was given at the trial, and that the plaintiffs, having proved all that was there averred, are entitled to succeed, however far the evidence may have been from establishing a good case in fact. That doctrine cannot now be upheld; and the case of *Spencely v. Sutton*, 1 *Ld. Ray.* 704, which was relied on, is by no means an authority to that extent. Moreover, the fifth plea distinctly denies that Mosier was ever in custody of the defendant; and the plea of *nil debet* clearly makes it necessary for the plaintiffs to prove an escape, which cannot be without a previous legal custody.

Rule discharged.

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DOE EX DEM. PATTERSON V. DAVIS, AND DOE EX DEM.  
PATTERSON V. DEWITT.

*Alien.*

A person who was born in the United States before the Revolution, and has continued to reside there since, is an alien, and cannot maintain ejectment in this country.

In these two cases the same question, upon the same evidence, stood for decision. The lessor of the plaintiff claimed to inherit certain lands in this province, as heir to his father. It was objected that he was an alien, and therefore incapable of inheriting. At the trial, at the last assizes for the District of Gore, it was proved that the father was born in one of the British American Colonies, before their revolt, and was therefore a natural born British subject: that he remained in the United States after their separation and independence, until about the year 1802, when he came and settled in Upper Canada, and died here, six or seven years afterwards. It was not shewn that he had received lands by grant from the Crown, or held any office, or stood in any one of those relations which could entitle him to be regarded as a subject, under the provisions of our Naturalization Act, 9 Geo. IV.

The lessor of the plaintiff was his eldest son, born also in one of the British American Colonies before their revolt. During the contest for independence, and ever after, he continued to reside in that country, having visited this province twice and remained in it a few days, but having never been a resident inhabitant of Upper Canada, or any other part of the British dominions.



ROBINSON, C. J., delivered the judgment of the court.

It is immaterial in this case to inquire into the capacity of the father to hold real estate in this province, since it is clear that the lessor of the plaintiff, upon the principle established by decisions both in England and here, and recognized by the legislature of this province, must be regarded as an alien; and there is nothing in our statute 9 Geo. IV. which extends to a person so situated the privileges of a British subject.

The verdict for the defendant will therefore stand.

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### BURNS V. DONELLY AND KAY.

*Bail—Plea that after ca. sa. issued the plaintiff gave notice to the sheriff not to arrest their principal.*

A plea by bail to an action on their recognizance, that after the issuing of the *ca. sa.* against their principal the plaintiff gave notice to the sheriff not to arrest him, is bad on general demurrer.

This was an action of debt on recognizance of bail. The defendants pleaded, that after the *ca. sa.* issued against the defendant in the original action, the plaintiff in writing forbade the sheriff to arrest the defendant thereon, and that in consequence he did not arrest him and refused to do so.

The plaintiff demurred generally to this plea.

ROBINSON, C. J.—I am of opinion that this plea is not a defence. The condition of the recognizance is truly set out in the declaration: it is, that in case the plaintiff shall recover, the defendant shall pay the costs and condemnation money, or surrender himself to the custody of the sheriff of the District of Niagara, or the bail will do it for him. The *ca. sa.* is merely notice that the plaintiff intends to take his remedy against the person: it is the business of the bail to go to the office and enquire whether the *ca. sa.* has been placed in the hands of the sheriff; and, if it has been, they can no otherwise discharge themselves of their undertaking than by surrendering the defendant or paying the debt. If a direction to return *non est inventus* be given by the plaintiff, it can constitute no defence in pleading.

The court in this case, however, gave judgment for the



defendant on demurrer, on account of several repugnancies in the plaintiff's declaration with regard to dates and sums.

Judgment for the defendant on demurrer.

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GOODERHAM V. CHILVER.

*Costs—District Court.*

Where the plaintiff's claim is within the jurisdiction of the District Court it is no ground for a certificate for full costs that the defendant's set off could not be tried in the District Court.

In this case, tried at Toronto before *Macaulay, J.*, it became a question, whether in a case in which the plaintiff recovered but a few shillings, and which was clearly of the proper cognizance of the District Court, the judge could properly certify for King's Bench costs, on the ground that the defendant's set off involved a question proper to be tried in the King's Bench. It was mentioned in this term and considered by the judges, and they determined that where there was no ground for certifying as respected the plaintiff's cause of action, a certificate should not be granted by reason of the value or difficulty of matters litigated upon the set off; otherwise a defendant, by urging, though unsuccessfully, a *bonâ fide* defence, would be in a worse situation than if he opposed the plaintiff's recovery without any ground.

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DOE EX DEM. MCGREGOR V. HAWKE, AND DOE EX DEM.  
MCGREGOR V. CROW.

*Statute of Limitations—Mortgage satisfied after twenty years' possession subsequent to default.*

When the mortgagor is in possession, a mortgage may be presumed satisfied when twenty years have elapsed from the time of the payment of the mortgage money.

Both these actions were brought, on the same title, against tenants in possession of different portions of lot 8, in the front, or first concession of East Dover.

On the 15th of December 1796, the Crown granted the land by letters patent to Thomas Clark; and on the 15th of June 1799, Clark mortgaged in fee to McGregor, father



of the lessor of the plaintiff, with proviso for redemption by paying £200 in two years.

This mortgage was registered the 26th of April 1804. On the 28th of April 1828, McGregor, the mortgagee, made his will in these terms: "I give, devise and bequeath unto my son, John McGregor, a mortgage and the interest that has accrued thereon, that I hold from Thomas Clark on lot number 7, 1st concession of East Dover."

Parol evidence was admitted to shew that lot 7 belonged to another person, and that the lot mortgaged by Clark, and intended to be devised, must have been the lot 8.

No evidence was given at the trial to shew that the principal or interest was ever paid. The mortgage and patent deed were found among the papers of the testator McGregor, and on these and the will simply the plaintiff supported his action.

The mortgagee was not proved to have been ever in possession; but on the other hand, it was shewn that the mortgagor, Clark, had continued in possession to the time of his death, a few years ago; since which period the defendant had gone into possession, under a person who had lived with Clark on the premises as a tenant, working the farm on shares.

Upon this evidence a verdict was given for the plaintiff which affirmed the mortgage to be in force and unsatisfied; though the mortgagor and those claiming under him had been for about forty years in uninterrupted possession, and without proof of payment on account, or of acknowledgment of the debt being unsatisfied within that period.

ROBINSON, C. J., delivered the judgment of the court.

It is very possible that the verdict may be in accordance with justice and with the real facts of the case,—for the mortgage may never have been satisfied. But we apprehend that independently of our late statute 4 Will. IV. ch. 1., for amending the law respecting real property—the 16th, 17th, 19th, 27th and 43rd sections of which must be considered in the future disposal of this case—the defen-



dant, upon the principles of the common law, was entitled to a verdict upon these facts.

What distinguishes this case from that of *Hall v. Doe ex dem. Surtees* (5 B. & A. 687) is that in that case it was expressly found by the jury that default was made by the mortgagor, the money not being paid at the day, and his possession after the default (which, under the terms of that mortgage, was rightful before) was not deemed adverse; but, on the contrary, the court entertained the presumption that he continued to possess by the sufferance of the mortgagee—the contrary not being found by the jury. Here there is no finding of the jury, and, indeed, no evidence that the money was not paid at the day; and the question is, whether, after nearly forty years continued peaceable possession, and nothing in the meantime appearing to shew the contrary, the jury should not have been directed to presume the mortgage satisfied.

The estate in this case is not shewn to have become absolute—it was subject to be defeated by payment of the money; and, if under these facts that should have been presumed, then, of course, there should be no recovery on the mortgage.

It may be in the power of the parties, on another trial, to shew the truth of the case more clearly, and the lessor of the plaintiff may lay sufficient ground for rebutting the presumption of payment. The patent and mortgage being in the custody of the mortgagee, and the mortgage being made the subject of a devise in 1828, though they may have no legal effect, naturally lead to a belief that the debt is unpaid; and some proof of that may be supplied. As the mortgage was registered after the day set for paying the money, it may be well to enquire at whose instance, or, rather, upon whose memorial, it was put upon record. If the mortgagor executed the memorial, that would be a strong circumstance.

We are of opinion that the rule must be made absolute for setting aside this verdict and granting a new trial—costs to abide the event.

Rule absolute.



## DOE DEM. LAWSON V. COUTTS.

*Lease.*

A lease for life for a nominal rent, not under seal, although it cannot pass a freehold interest, will operate as a lease from year to year, and the lessee cannot be dispossessed without six months' notice to quit.

This ejectment was tried before Robinson, C. J., at the last assizes for the district of Gore. It was proved that the lessor of the plaintiff, from a motive of friendship towards the defendant, who had recently arrived from Great Britain with his family, gave him a lease for life of the premises in question, at a renewal rent of a shilling annually, stipulating that if the defendant should remove to any other part of the province his interest in the land should cease; the intention being that he might occupy the land so long as he chose to live upon it, but no longer.

The defendant lived some years on the land, and improved it; but disputes having arisen between him and the lessor of the plaintiff, this action was brought to turn the defendant out of possession.

The instrument which the lessor of the plaintiff had executed in favor of the defendant was not sealed, and it was contended on his part that, not being valid to pass the life estate, the defendant was merely tenant at will, and might be treated as a trespasser, if he held over after possession being demanded.

The learned Chief Justice, at the trial, expressed his opinion that a freehold clearly could not pass by the instrument, but the justice of the case being strongly with the defendant upon the facts proved, he recommended to the jury to find for the defendant, reserving leave to the plaintiff to move to enter a verdict in his favor, if the court should be of opinion that six months' notice to quit was not necessary, and that the plaintiff was entitled to recover on proving a demand of possession.

A rule nisi was accordingly granted in Michaelmas Term last, and cause was shewn this term, by *O'Reilly*, for the defendant.

*Per Cur.*—We are all of the opinion that the verdict for the defendant should stand. Though the writing produced



had not the effect of creating an estate for life, it constituted a tenancy from year to year at the nominal rent mentioned, and six months notice was necessary before the lessor of the plaintiff could claim the possession.

There was here only a demand of possession a short time before action brought.

Rule discharged.

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ROWAND V. TYLER.

*Amendment—Appeal.*

A record was amended in matter of form after an appeal to the King in Council.

After this case had been carried to the King and Privy Council, by appeal, it was discovered that an error was made in omitting to enter a formal judgment upon some of the issues, and the court was moved by Mr. *Baldwin* for leave to amend the record of the judgment, in order that an amended transcript might be sent to England.

The judgment of this court had been affirmed by the Governor in Council, and the defendant in the action had appealed to the King and Council. A transcript of the record, returned to this court from the Court of Appeal in this province, with the judgment of affirmance, had been certified by the Chief Justice.

After hearing the Attorney General against the amendment, the court made the rule absolute.

Rule absolute.

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BURNS V. GRIER AND CAMPBELL.

*Bail—Plea, that they did not become bail—Variance.*

A plea by bail to an action on their recognizance that they did not become bail, concluding to the country, is bad on special demurrer; and on pleas of *nul tiel* record to the judgment and no *ca. sa.* a judgment varying in the term from that stated in the declaration, and a *ca. sa.* in a form of action different from that stated in the replication, constitute a fatal variance.

The action was debt on recognizance of bail. The defendants pleaded that they did not become bail, and concluded to the country.



The plaintiff demurred specially for this ill conclusion.

*Per Cur.*—We are of opinion that the plea is bad, for the cause assigned. The plaintiff founds his action upon a record ; and the defendants, by their plea, would put in issue before the jury what can only be tried by the record.

But the declaration is faulty. It claims a debt of £164 upon a recognizance in which the defendants are bound only for the sum of £75, as appears by the declaration.

In this same case the defendants pleaded *nul tiel record* of the alleged recovery against the original debtor, and in another plea they denied that any *ca. sa.* issued upon the judgment. Judgment was given for the defendants on the first of these pleas, on account of a variance in setting out the judgment as a judgment of Michaelmas Term, 5 Wm. IV, when in fact it was entered in Michaelmas Term 6 William IV.

Upon the 2nd plea, the plaintiff produced the *ca. sa.* itself, which had been issued and returned by the sheriff, but had not been entered on the roll. It varied from the record pleaded, however, being erroneously taken out as in a plea of trespass, instead of trespass on the case on promises, and for this variance the defendant had judgment.

### MARY TAYLER V. JANE TAYLER.

*Waste.*—6 *Edward I. ch. 5.*

An action on the case for waste may be brought, under 6 Edward I. ch. 5, by him in remainder for life or years ; and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber

This was an action in the case, in nature of waste, brought under the following circumstances :

One Tayler, seised in fee, devised to his wife, Jane Tayler, for life, remainder to the plaintiff Mary Tayler and her heirs, and if she should die without issue, then to his niece Mary Marat, in fee : and the testator inserted this direction in his will—"It is my further will and pleasure that no part of the oak timber upon my said land shall be cut or disposed of during the life of my said wife Jane."



After the death of Tayler, the devisor, the land was let by the defendant, the tenant for life, to several tenants in succession; and she sold ash rails off the land, some cordwood and cedar posts, not however to any large amount in value.

It was objected at the trial, before Macaulay J., at the last assizes at Brockville, that the plaintiff could not sue for waste from the nature of her interest: and, secondly, that the will, by prohibiting her from cutting oak timber, gave her an implied permission to cut any other timber. The jury, under the direction of the court, gave a verdict for the plaintiff and £2 14s. damages.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff is entitled to enter up judgment. As to the first point, the plaintiff's right to this action is clear. She had a vested estate in remainder; and though it is true that she could not bring an action of waste at common law—because the action, before the statute, lay only against those whose estates were created by law as tenant by the courtesy, tenant in dower, &c.—yet, under the statute, she could, because that gave a remedy against the tenant for life, whose estate came by grant, or contract; and it is clear that this action on the case in nature of waste may be brought by heirs in reversion, or remainder for life or years.

With respect to the effect of excepting the oak timber in the will, it is evident that the exception was inserted as a restriction upon the right which the intermediate tenant would otherwise have to take reasonable estovers. The devisor meant that oak should not be cut for any purpose. With respect to the other timber, he did not attempt to restrain the tenant for life, further than the law would already restrain her; nor can it be implied that he meant to extend her privilege. The selling rails, firewood and cedar posts from the land was clearly waste, and the verdict was, in our opinion, properly rendered.

This rule therefore is discharged.

Rule discharged.



## HAMILTON V. LYONS.

*Deed—Action against registrar for treble damages, when maintainable—  
Memorial of mortgage.*

An action cannot be brought against a registrar for treble damages, under 35 Geo. III. ch. 5, sec. 10, until he has been convicted under that section of some offence for which he shall forfeit his office.

It is not necessary in the memorial of a mortgage to notice the proviso for redemption.

This was an action of debt, brought against the defendant as registrar for the county of Lincoln, upon the 10th clause of the provincial statute 35 Geo. III, ch. 5, which enacts, "that if any registrar or his deputy shall neglect to perform his duty in the execution of his office according to the rules and directions mentioned in the act, or shall commit, or suffer to be committed, any undue or fraudulent practice in the execution of the said office, *and be thereof lawfully convicted*, that *then* such registrar shall forfeit his said office, and pay treble damages with full costs of suit to every person or persons that shall be injured thereby, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record, wherein no protection, privilege or wager of law shall be allowed, &c."

The declaration stated that the plaintiff, being the grantee in a certain deed of mortgage, had executed a memorial for the registry thereof; which memorial, with the subscribing witness to prove the execution of the same, and of the mortgage, was taken to the office of the registrar, who was required to administer the oath and register the deed, but that he neglected and refused; and thereby the plaintiff hath sustained damage to the amount of £—, and an action hath thereupon accrued to the plaintiff to recover £—, being the treble the amount of the said damages, according to the statute, &c.

To the 1st, 2nd, and 3rd counts the defendant pleads specially, that the memorial produced to him to be registered contained no statement of the proviso for the redemption of the mortgage; and, to these pleas the plaintiff demurs specially, assigning for cause that they tender an immaterial issue.



ROBINSON, C. J., delivered the judgment of the court.

We are not of opinion that the act makes it necessary to notice in the memorial of a mortgage the proviso for redemption: though the schedule appended to the act contains a form of memorial of a mortgage in which the proviso is stated, yet parties are not by the act confined to this form, and the 5th clause, which sets forth the particulars to be contained in any memorial, does not exact it.

But we are against the plaintiff's action, upon the substantial ground that this action for treble damages, under the statute, cannot be brought until after a conviction of the defendant of some offence against the 10th clause of the act, for which he shall be adjudged to forfeit his office, and pay treble damages. The right to bring such an action only accrues upon the conviction. It is very possible that, by some slip of the registrar, a party may receive an injury for which he may recover recompense in an action, although the act or omission might not be such as should lead to a conviction for an offence against the statute. But to be in a situation to sue for treble damages, the plaintiff must shew that for a misfeasance, or an omission, the defendant has been convicted, as for a crime, and that in consequence of the same crime, he has received damage; and then he establishes his right to the penalty of treble damages. Criminal intention, or culpable negligence, must enter into a case of this kind: a bare refusal, or omission does not necessarily imply either the one or the other.

Judgment for the defendant.

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#### CLOCK v. ALFIELD.

*Attachment.—Affidavit.*

The court will only grant an attachment under the Absconding Debtor's Act, for sums certain, when such an affidavit could be made as would enable a plaintiff, without a judge's order, to sue out bailable process.

*Hitchings* moved for an attachment, under the Absconding Debtor's Act, upon an affidavit, claiming damages for not repairing fences upon a farm leased to the defendant.



The court would not order an attachment, saying that the statute, in their opinion, intended the remedy only in cases of debts for sums certain, when such an affidavit could be made as would enable a plaintiff, without a judge's order, to sue out bailable process.

Attachment refused.

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### LOCKMAN V. NESSE.

*Dower—When damages recoverable—Plea of ne unques seisie—Evidence.*

In dower, the demandant is entitled to damages only when the husband died seised.

Under the plea of *ne unques seisie*, possession by the husband is *prima facie* evidence of a seisin in fee.

This was an action of dower, brought by the widow against the alienee of the husband. The tenant pleaded *ne unques seisie que dower*, and *ne unques accouple*, &c.

Upon the trial it was objected that the evidence of seisin in the husband was not sufficient, and that the marriage was not legally proved.

With respect to the husband's seisin, the learned Chief Justice had doubts at the trial upon the sufficiency of the evidence. The demandant attempted to prove seisin in her late husband, by giving evidence of the deeds under which he derived title; and exceptions were taken to the manner in which the execution of the deeds was proved. He allowed the evidence of seisin, however, to be sufficient, subject to any exceptions raised at the trial to the proof of execution of the deed and the secondary evidence offered of their contents. The marriage appeared to be sufficiently proved. It was shewn that they were married by a magistrate many years ago, and at a time when there was no clergyman of the Church of England resident within eighteen miles of them. For the tenant it was contended, that proof should be given of the publication of the notice, according to our statute 33 Geo. III., ch. 5, and that the only proper evidence of the marriage was the production of the certificate registered by the clerk of the peace, as provided for by the 3rd section of the statute, or of a copy thereof.

These exceptions to the proof of the marriage were over-



ruled, and it was held to be sufficiently established by the evidence of an eye-witness present at the ceremony—the certificate and registry being merely a mode of proof, afforded by the statute for the convenience and security of the parties, but not the only mode, nor the best mode.

The record contained no award of a *venire* to assess damages for detention of the dower; and it appeared to the learned judge that on that account the jury had no authority to find damages: but, as he desired to afford every facility to the demandant in the proceeding, he therefore suffered the damages to be assessed, that the amount might be ascertained in case the proceeding could be supported.

ROBINSON, C. J., delivered the judgment of the Court.

Upon consideration of this case, we are of opinion that the seisin of the husband was sufficiently proved. He was shewn to have been in possession of the estate until he conveyed it in fee to one Smith. His possession was *prima facie* evidence of a seisin in fee; as no proof was offered that he had a life estate, it was unnecessary to give further evidence of his title.

The demandant is entitled to judgment of seisin for a third part of the premises: but as to damages, independently of any formal objection from the manner in which the *nisi prius* record is made up, there were no damages to be awarded to the demandant in this case, for her husband did not die seised. It is not averred in the record that he did; and it was shewn at the trial that he did not, but that he aliened in his lifetime to one Smith.

The Statute of Merton, 20 Henry III. ch. 1, extends only to cases where the husband died seised, and gives damages in such cases only. *Delvin v. Hunter*, Bunb. 5; *Co. Litt.* 32-33, *Saund.* 446, *Cruise Dig. Dower*. At common law no damages were recoverable.

The verdict therefore, so far as respects the damages, must be set aside, and the demandant is entitled to judgment of seisin—the verdict upon the two issues standing in her favor. These pleas, it seems, denying the seisin of her husband and the marriage, could not be pleaded



together in England, but for a reason which does not apply here, where there is no ecclesiastical jurisdiction, and where, consequently, both must be treated as issues in fact, to be determined in the same manner by a jury.

Judgment of seisin for the demandant.

IN RE APPLICATION OF BARNHART, FORMERLY GAOLER OF THE HOME DISTRICT, V. THE JUSTICES OF THE HOME DISTRICT.

*Mandamus—General principle as to issuing.*

A mandamus never issues except to admit or restore some person to an ascertained right.

The court was moved for a mandamus to compel the justices of the peace for the Home District to make an order upon their treasurer to pay to Barnhart, the late gaoler, several sums of money which he claimed—1st. For the expense of a guard provided by him to prevent the escape of prisoners, rendered necessary, as he said, by the insufficiency of the gaol. 2nd. For expenses defrayed by him in re-taking prisoners under criminal charges, who had escaped from the gaol. 3rd. An additional allowance of five shillings per week, for the charge of maintaining several insane persons in the gaol.

*Per Cur.*—We are of opinion that we cannot grant the mandamus upon any of the grounds on which it is prayed.

Upon the case stated in the affidavit, we cannot say that the applicant has a specific legal right to any of the charges to which he lays claim, and a mandamus never issues except to admit or restore a person to an ascertained right.

As to the first head of charges, the law makes no provision for it; and to allow it, as a matter of course, would tend to lessen the vigilance of the gaoler. The peculiar circumstances of the case may have been such as to warrant on a particular occasion the incurring of such an expense by the justices; but the discretion rests with them: they are the dispensers of the district revenues; and this court can only interfere where they have no discretion to exercise, or



when they refuse or omit to pay some specific ascertained charge which is clearly incumbent upon them. The same remarks apply to the charges for re-taking prisoners. We have no authority for saying that the justices shall reimburse such an expenditure. And, as to the additional sum claimed for supporting insane persons in the gaol, that matter is by law subjected to the control of the Quarter Sessions, and of the grand juries at that court. We are not the judges of the proper allowance for supporting an insane person; it is not fixed by law: the Court of Quarter Sessions is to allow what they find to be reasonable.

Mandamus refused.

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BOYCE V. PARK ET AL.

*Witness.*

A joint contractor with the defendant, not joined in the action, may be witness for the plaintiff, and a release (though unnecessary) given by the plaintiff to him immediately before the trial to enable him to give testimony, will not operate as a discharge of the defendant, unless pleaded *puis darrein continuance*.

The plaintiff sued in assumpsit for services rendered by him as a surveyor in exploring the line of the River Thames, in company with a civil engineer, in order to ascertain the improvements required for making the river navigable from London to Chatham. The defendants pleaded the general issue.

The case was this:—A number of persons had associated for the purpose of promoting the projected improvements, and a committee of gentlemen had been appointed to collect subscriptions. Another committee had been appointed who were to employ engineers and workmen. The defendants, it was alleged, were members of this committee, and as such they came to Mr. Harris, who was one of the subscribers to the undertaking, and asked him to write to the plaintiff, with whom he was acquainted and who then lived in another part of the country, to offer him employment, as the surveyor to attend upon the engineer. Mr. Harris had before spoken of the plaintiff as a person well qualified, and this led to the defendant s'requesting him to write to the



plaintiff, desiring his attendance. A note was accordingly written by Harris to the plaintiff, merely apprising him that he would be employed if he came immediately, and not stating at whose particular instance he sent for him. The plaintiff came and was employed some weeks upon the service.

When the survey was completed, there were not funds collected to meet the expense. The committee were disappointed in their expectations of receiving subscriptions. The plaintiff waited the result of an unsuccessful application to the Legislature for assistance; and, after considerable delay, he took measures for enforcing payment from those who had employed him. He first applied to Harris, and demanded payment from him; but the latter assured him that his motive was merely to serve him, and that, having suggested his name, he had, upon the particular request of the two defendants, written to desire his attendance, without any idea of being his employer; not being, as he declared, one of the committee, or in any manner concerned in the management of the work. Being thus referred by Harris to these defendants as the persons to whom he ought to look, the plaintiff brought this action against them; and at the trial Harris was produced as a witness to prove the employment through himself as agent. It seemed to have been apprehended that Harris might be objected to as incompetent from interest, and on the day before the assizes commenced an ordinary general release was sealed by the plaintiff discharging Harris from all actions, demands, &c.

Harris proved the case clearly against the defendants: but on their part it was objected that he was equally liable with themselves, because he had written for the plaintiff and because (as they alleged) he was a member of the committee of subscribers.

ROBINSON, C. J.—As the defendants did not plead the non-joinder of Harris in abatement, it was immaterial on the general issue whether he was liable jointly with them or not: and that he was liable, as a member of the committee, was by no means clearly made out. He denied that he was



a member of any committee, and that fact stood doubtful on the evidence. I could not say that it was by any means proved that he was a member of the committee to employ engineers, or had ever acted as such.

That Harris might have been sued by the plaintiff, upon his letter of employment, was clear: but it was equally clear that the plaintiff, when informed that he had written at the instance of the defendants, might forbear to hold him liable and take his recourse against the defendants; and it was more just that he should do so, if they were persons responsible in point of property.

Whether Harris was jointly liable with the defendants or not, was made a material question at the trial, upon this ground—that the release of the plaintiff to Harris, though executed only for the purpose of doing away with any objection to his admissibility as a witness, had the effect, in law, of releasing the defendants as co-contractors with him; wherefore the defendants were entitled to a verdict.

It did not appear to me that I could give effect to this defence. The two defendants were proved to be the individuals at whose immediate instance the plaintiff was employed. When the plaintiff learned this, he naturally and properly brought his action against them; and though he might have looked to the dozen members, or more, who composed the committee, or perhaps to all the subscribers to the undertaking, yet he was not bound to do so, even if he had known all who were responsible. On the ground on which they were made liable, Harris was not a co-contractor with them, and if he was liable in another capacity, either as a stockholder with them, or as having transmitted their request, the releasing him under such circumstances could not operate in their discharge any more than releasing the indorsee of a note can discharge the maker.

The principle applies only to the case of a joint contract, and I did not see that a joint contract was proved. These were my impressions at the trial, and under my direction the jury found for the plaintiff.

A new trial has been moved for on the ground that the verdict was against law and evidence, and for misdirection.



The case turns wholly on the effect of the release ; and, as to that, I am of the opinion that it could only have the effect of discharging these defendants in case they were co-contractors with Harris, and as such jointly liable to the plaintiff. In such cases the release has that effect, because it affords the presumption of payment as being the ground of release ; and, of course, payment by any one would be an extinguishment of the debt. And so the releasing any person who is liable on a bill or note before the person who is sued operates in discharge of the person sued, because it interferes with his recourse for indemnity. But the releasing a later party to the bill or note has not such effect, because the prior party would, at any rate, have no right of action against him. And here, if Harris might have been sued on the ground of his writing the letter to the plaintiff, the releasing him from his liability would not affect the right of action against the defendants, as being the persons who caused him to write the letter ; because their liability rests on a distinct ground, and they would at any rate have no remedy against Harris for contribution.

That Harris was a joint member of the committee in which these defendants acted, I did not see upon the evidence at the trial. It is possible the jury might have found he was, if it had been left to them as a doubtful point ; but I did not expressly call on them to say whether he was or not : and if they had found that he was, I cannot say that their finding would have been supported by the weight of testimony. And besides, it appeared to me that these defendants were not sued as members of any committee, and that it was not necessary they should be, since the agent need look no further than those who employed him.

I see now no good reason for disturbing the verdict. The release being given just before the trial, clearly could not, under any circumstances, bar the recovery upon the general issue. To give it that effect, it must have been pleaded after the last continuance. The verdict therefore is rightly with the plaintiff in point of law, and I think there is nothing in the justice of the case that calls upon us to disturb it.



I am of opinion, therefore, that the rule should be discharged. And I will add, that I have not yet satisfied myself that a release given, as this was, on the eve of the trial and for the very purpose of qualifying a witness to prove the debt against others, should be allowed to have the effect of releasing those others, on the ground that it affords presumption of payment, the particular purpose for which it is advanced shewing clearly that it was not given in consequence of the debt being paid, but rather for the purpose of enforcing payment.

It may perhaps be necessary, however, to give the release such effect in the case of joint contractors, where nothing appears on the face of the instrument to shew that it was given with another intent.

The defendants in this case urged another defence at the trial, which appeared to include the ground on which, chiefly, they had resisted payment of the demand. They contended that the plaintiff, from the nature of the transaction, ought to be content to look to the chance of remuneration from some public fund, or from the collection of monies subscribed ; and it was surmised that he had desired the employment for the sake of the experience it would give him, and without a view to remuneration. The evidence, however, did not support a defence on either of these grounds, and so the jury thought on the facts submitted to them.

Rule discharged.

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## TRINITY TERM, 7 WILL. IV.

## FISHER V. THAYER.

*Affidavit.—Jurat.*

When a *jurat* to an affidavit made by two persons does not state that both were sworn, an amendment will be allowed by the insertion of their names.

A rule nisi was obtained last term for setting aside an attachment on account of a defect in the *jurat* of the affidavit. It was not stated that the several deponents (naming them) were sworn &c.

*Baldwin*, before the return of the rule, obtained a rule nisi to amend the *jurat* by taking the affidavit off the files, and having it again attested by the commissioner in proper form. In this term, after cause shewn, the court allowed the *jurat* to be amended on payment of costs, and discharged the rule for setting aside the attachment, making the plaintiff pay the costs of that application.

Rule absolute.

## CASLER V. RANSOM ET AL.

*Award—Construction of—Mill-dam.*

Where arbitrators, to whom disputes, arising from the over-flowing of three acres of the plaintiff's land by water thrown back by the defendant's mill, were referred, awarded damages to the plaintiff for the injury, and that the defendants should have a full fall of nine feet and no more, for their mill-dam, provided that the water on the plaintiff's land was not raised thereby, and the defendants raised their dam to nine feet and overflowed five acres more of the plaintiff's land:

*Held*, that the award did not prevent his recovery of compensation for such further injury, and that he was entitled to damages for the additional five acres.

This was a special action on the case for overflowing the plaintiff's land.

The plaintiff was the proprietor of land situate on the River Credit; and some years ago he sold part of his tract, situate lower down the river than that which he himself occupied, to Ransom and one Bennett, who were then partners, and desired the situation for the purpose of erect-



ing a saw-mill upon it: Bennet had since sold out his interest to the other defendant Sheldon. Before this transfer of Bennett's share, Ransom and Bennett had built the mill and put up a dam, which it seemed occasioned back water upon the plaintiff's land to an extent greater than had been anticipated, or than was authorised by any agreement between the parties; and, in consequence, disputes arose between them, which, in the winter of 1834, were referred to arbitration by bonds of submission in the ordinary form where the submission is general, of all matters in difference &c.

In February 1834 the arbitrators made their award, directing that Ransom and Bennett should pay to the plaintiff £114, with £6 for the costs of the arbitration, on or before the 1st of May then next; and they further awarded as follows: "that Ransom and Bennett, or their heirs or assigns, shall have the full, free and undisturbed privilege of the waters of the Credit, where their mill and dam are now established, on or within any part of their limits, from this time for ever: *provided they do not* raise the said dam any higher than to give them a head and fall of nine feet, or any higher than it has been in time past—and this award and order shall not affect any other accounts, notes or dealings whatsoever, which may have been had or made at any time heretofore between the said parties; but the said £114 is ordered to be paid as the amount of damages found by us to have been sustained by the said Richard Casler, in consequence of the overflowing of part of his farm by a mill-dam erected by the said Israel Ransom and Josiah Bennett."

It was proved at the trial, that, up to the time of the award, about three acres of ground belonging to the plaintiff had been usually covered with water backed up by the dam of Ransom and Bennett; and that the estimate of damages awarded was founded upon the value of those three acres, and on the supposition that they would continue to be overflowed as they had been, and thus be rendered wholly useless to the plaintiff.

After this award, Bennett sold out to Sheldon; and Ransom and Sheldon, the defendants in this action, re-



paired and raised their dam, so that it caused the water to back to a greater extent upon the plaintiff, covering eight acres of his land, or five acres more than had been overflowed up to the time of making the award.

The defendants met the plaintiff's claim to damages for this increased injury, by contending; 1st, that the dam was not higher than sufficient to raise a head and fall of nine feet, and that the award gave a right to the privilege to that extent without regard to the quantity of land covered.

2ndly, that if any doubt were entertained of the right of the arbitrators to bind the plaintiff by their award in this respect, his subsequent acceptance of the sum awarded precluded him now from taking this objection.

ROBINSON, C. J., delivered the judgment of the court.

It appeared to me at the trial, that the true construction to be put upon the award was, that the defendants should neither exceed the nine feet, nor should they raise the water higher than it had been raised before the making of the award.

The language being in the disjunctive, and the order in which the words stood, as well as the reason of the thing, all appeared to me then, as they do now, to lead to this construction. It was assumed, it seems, by the arbitrators, that the present dam raised a head of water of nine feet; for the damage it occasioned in that state, they gave a compensation; and, as their object was to make a final settlement of the dispute between the parties, they desired to express that the damages they gave were meant as a recompense for the extent of the injury as matters then stood: they therefore thought it right to say, that having given these damages to the plaintiff, the defendants were to be permitted to enjoy the privilege. They set down the nine feet as the then assumed height for the protection of the plaintiff, that he might have a certain standard beyond which the defendants could not pass: up to that line the defendants might exercise the privilege, subject, however, to this qualification, that as it was not meant to increase their right, or add to the plaintiff's injury, if the plaintiff



could shew that their dam at any time raised the water higher than it ever had been before the award, then they were to have a claim for damage, although the dam might not raise a head of water above nine feet. The onus of this proof would be thrown upon the plaintiff, so long as the nine feet were not exceeded; but the intention is clear, that the defendants shall not raise their dam above nine feet, nor shall they raise the water higher than it had been raised before. This is in accordance with the grammatical construction, as well as with the justice of the case. On any other understanding of the words, the arbitrators would have strangely exceeded their powers. Here it was proved that five acres more had been overflowed than used to be before the award: the damages were not awarded for any such new injury to be afterwards committed. The award says this expressly, and therefore, by taking the money, the plaintiff could have compromised no right to sue for the damages given by this verdict.

My brothers give the same construction to the award, and are of opinion that the rule for a new trial should be discharged.

Rule discharged.

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### McNAB v. McGRATH.

*Libel.—Words imputing arson.—Action when maintainable.*

An action cannot be maintained for words spoken imputing the crime of arson to the plaintiff, when from the evidence it appeared that the burning of the building of which the plaintiff was accused would not have constituted such crime.

The plaintiff sued for slanderous words uttered by the defendant, charging him, as he declared, with the crime of arson.

It was proved that a building in the village of Streetsville was set fire to, which had been occupied as a shop, and was fitted up with shelves, but which for a year or more had not been occupied as a shop, but contained some iron in the cellar, belonging to a person residing in another house, who took it from thence as he wanted it, but did not expose it there for sale; it was otherwise an empty building, and was not inhabited for any purpose.



The plaintiff's witnesses proved, that while the defendant and others were sitting together in another house in the village, one of the party went out of doors and discovered this building to be in flames. That he immediately alarmed the others, who rushed to the spot, and found that some incendiary had torn away some of the clapboards and thrown in a quantity of fine split wood and set fire to it.

The defendant and the others extinguished the fire. A conversation arose at the time as to the probable offender, and suspicions were generally entertained and expressed of the plaintiff from circumstances that were spoken of not more particularly by the defendant than by others. The defendant had charge of a house, or store, in the vicinity of the building thus attempted to be set fire to, and in the excitement during the same evening, he rode to the owner's residence, seven miles off, to recommend him to insure it.

The next morning, having returned to the village, and this matter being generally the subject of conversation, the defendant said, "the plaintiff had set the store on fire and none but him."

The plaintiff's witnesses stated they had heard before of the plaintiff being suspected, and that others, as well as the defendant, expressed suspicion of the plaintiff from former occurrences: they would not say that the defendant originated the report, and they stated that the defendant and others went to the assizes and were examined by the grand jury on the charge against the plaintiff. It was not alleged that the defendant was prosecutor of that charge, or that he attended otherwise than as witnesses usually do.

It was objected at the trial that the burning of a store is not arson; and that the declaration was not sustained on any count.

The learned judge overruled these objections, upon the ground, that, though the defendant might have spoken of the building as a store, and though a store is not enumerated in the statute respecting the crime of arson, yet as it appeared to be a shop, which is a building included in the statute, and as it was well understood by the bystanders



what building was referred to, the declaration containing the proper innuendo was supported.

The defendant then called witnesses who proved that the suspicion of the plaintiff was general; that many others expressed it at the time; that one Barnhart prosecuted the plaintiff on the charge; that the defendant and others were summoned as witnesses, and that others were more active in prosecuting than the defendant was; that the defendant only knew and heard of the matter suddenly as others did, and expressed himself as they did.

The learned judge told the jury that the plaintiff was entitled to their verdict, if the words were spoken—the defendant not having justified; for that the prevalence of reports or probability of the charge could only mitigate damages on the general issue.

The jury found for the plaintiff, with £25 damages.

ROBINSON, C. J., delivered the judgment of court.

This case has been some time pending, from the circumstance that after we had formed our judgment upon the question principally discussed in the argument, and which was not without difficulty, a doubt arose with us, whether the words charged imported an imputation of the crime of arson, as the plaintiff assumed in his declaration; and upon this point, which was moved at the trial, we desired to hear the counsel more fully, after they had been apprised of our difficulty; because our intimation of a contrary impression in the course of the argument has probably led to this branch of the case not being much insisted upon in the argument. The counsel did not find it convenient to discuss the case on this ground, until last term; and it has become necessary that it should stand over for consideration. We are now prepared to dispose of the case.

It appears to me that we must hold the case to be against the plaintiff, upon the objection raised at the trial, that setting fire to the building in question was not arson; and, therefore, that the charging a person with that act was not charging him with arson, and so that the defendant did not



impute to the plaintiff the crime of arson, as the declaration alleges. This objection lies at the root of the action, and is precisely the objection taken in Barham's case, 4 Co. Rep. 20.

Our statute 3 Wm. IV. ch. 3, makes it felony "to set fire to any church or chapel, or to any building commonly used for religious worship, or to any house, stable, coach-house, out-house, ware house, office, shop, mill, malthouse, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof."

The plaintiff has relied upon proving that this building, though the defendant called it a *store*, was in fact a shop, and as such the subject of arson. But the facts proved, I think, do not establish this.

It was clearly not intended by the legislature to make the burning of any and every building arson; for they have not designated many descriptions of buildings, which may be of more value than some of those enumerated; and many may be named which in their nature may be valuable, but which it is not and never has been arson to burn. We must suppose, then, a reason to have existed for drawing the distinction in each case. The reason which may have led to the including dwelling houses, for instance, or barns, or shops, can only be allowed to apply to buildings occupied as dwelling houses, or barns, or shops; for the reason must be derived from the intention to protect such occupation—either some reason of general or commercial policy, or a regard for the preservation of life or of property of a peculiar description, or peculiarly exposed to injury from malicious persons—not that a dwelling-house, barn or shop, can only be regarded as being legally such at the very moment when it is actually being used for its appropriate purpose. The house may have been left for a moment *animo revertendi*, in which case it is still the dwelling-house of its possessor; or the barn may for a moment have nothing in it, being casually empty, though in ordinary use and serving the purposes of a barn; or the shop may contain no merchandize in the short interval before an expected supply, but may be still a known shop in ordinary use as such.



But I take it that a mere building, though fitted or intended for any of these purposes, does not acquire its character till it has been appropriated to its proper purpose: nor, after it has been so appropriated, can it be held to retain always that character without any limit of time, merely by virtue of its having been once used in that particular character. The use must be continued to the time of the offence, or, if discontinued, must be discontinued under such circumstances as indicate an intended immediate resumption.

Otherwise there will be no warrant for establishing any limit as to time, or the actual condition of the building; and a house that twenty years ago was a shop, though it has been an empty shell since and fallen to decay, and applied to no use whatever, would be still a shop; for in matters of this kind, affecting life especially, there can be no arbitrary discretion committed to a judge or jury to make distinctions according to the value or state of the building, or the time it has been unoccupied.

If this building, after it ceased to be used as a shop, had been for six months occupied as a school-house, it must during that time have lost its character of a shop; not entirely because of its being applied to this other use, but because its application to this other use marked clearly the time of its ceasing to be a shop, and supplied evidence of it. And that may be as conclusively shewn by a decided disuse merely, either for a long time or for any time, when that disuse is not merely casual and with the intent of immediately resuming.

If the word "*tavern*" were used in the act, a building could surely not be treated at a *tavern* which had been for a year or for years untenanted, merely because it had once been used as a tavern, and had some appropriate fixtures still remaining in it.

By our assessment acts, a *shop* is the subject of a specific tax; but I do not imagine it has ever been supposed that a building is taxable as a shop after it had ceased to be used as such, and merely on the ground of a former occupation.

A shop is defined to be a place where things are publicly



sold. It has also another signification as a room where manufactures of some kind are carried on—as a shoe-maker's shop, a blacksmith's shop; but this sense is nearly confined, I think, to common speech. The legislature do not, generally at least, use the word shop to express a place where a manufacture is carried on—and, in this particular statute, they clearly have not; because buildings used in carrying on any trade or manufacture are protected under a separate and distinct provision, although the term shop had been used before. And, in fact, by their adding the qualification, *used in carrying on* any trade or manufacture, the legislature evinced that they intended to have reference to the purpose for which the building was actually used at the time of the offence, and not to the purpose for which it was intended, or to which it might at some former period have been applied.

Under the British statute which made it felony to steal privately in a shop, it has never been held that stealing privately in a building which once was a shop would bring the party within the penalty: so far from it, the statute has been so construed that it has been held not to apply, except in cases where the goods stolen in a shop were such goods as were actually exposed there for sale; because it was considered that the legislature were induced to apply the punishment of death, in order to protect a species of property, which in the prosecution of a necessary business was inevitably exposed to depredation.

And on the same principle it is to be considered in respect to this statute 3 Wm. IV. ch. 4, that the legislature had some particular reason for deeming a shop worthy of protection, which did not apply indiscriminately to all buildings. They probably were led by the consideration that a shop usually contains goods to a large amount, and sometimes of very great value, far beyond the value of the building, which would increase the injury in case of arson. And perhaps also by reflecting further, that arson of a shop might sometimes be committed by the hope of profiting by the plunder of the goods during the confusion;



but neither these reasons, nor any other that I can imagine, apply to a building not in use as a shop.

With respect to adjudged cases on this point, there is not much to be found; but all that can be called authority supports the principles I have stated. The decisions are chiefly with respect to burglary, where it is necessary to determine whether the building in question can be regarded as being a dwelling house at the time of the offence; and the principles which govern such decisions apply, I think, equally here.

Arson, at common law, is an injury to the actual possession, not merely the wrong in destroying a valuable property; and when the legislature have extended the limits of the crime, we must construe their enactments strictly.

As we are of this opinion, it follows that the declaration is not sustained by evidence, and that the verdict must be set aside. If it were not for this difficulty the *postea* probably would have been delivered to the plaintiff; but, for my own part, I am much inclined to the opinion, that, although no justification was specially pleaded, it was a question for the jury upon the general issue, under the circumstances I have mentioned, whether the words were maliciously uttered with intent to defame. I think it proper to state this doubt, because the case is rather a remarkable one in its circumstances, and I am not satisfied that, although the words were proved, the defendant might not have been acquitted under the general issue.

A malicious intent to defame is of the very essence of slander. It is true that a slander, when wholly unexplained, carries with it *primâ facie* evidence of a bad motive, and of the intent to occasion the injury which it is in its nature calculated to produce. And it therefore follows, that the jury *may*, and, in the absence of any proof to the contrary, should, convict the defendant of the malicious intention when the slanderous words are proved.

But the inference of malice may be satisfactorily repelled. The sense in which the words were spoken, the tone, the manner, the occasion, are all material to be considered in determining the question of malice: and it seems to me



that they are all open to the defendant on the general issue, because the existence of malice forms, in fact, a part of the plaintiff's case, which the general issue throws it upon him to prove, and admits the defendant on all points to deny.

A respectable writer upon this subject lays it down—that “where the justification arises from the occasion on which the words were published, or from the particular character of the author, it seems unnecessary to plead the defence specially, since the nature and essence of the defence is the absence of that malice which is essential to support the action.”—Starkie on Libel, 1st Ed. 373.

Rule absolute for new trial without costs.

#### BURN V. STRAIGHT.

*Arrest—Liability of defendant once discharged to be arrested again on the same judgment.*

A defendant discharged from custody by *supersedeas*, the plaintiff not having charged him in execution in due time, cannot be arrested again on the same judgment.

The defendant obtained a *supersedeas* for not being charged in execution in due time, but before he was discharged, the plaintiff sued out a *ca. sa.* on the same judgment and gave it to the sheriff before the *supersedeas* came to him, and he was held under the *ca. sa.* The defendant in this term moved to set aside the *ca. sa.* and to be discharged.

*Per Cur.*—The case of Line v. Lowe (7 East 330) expressly decides that a defendant superseded after judgment for want of being charged in execution in due time can never afterwards be taken in execution on the same judgment. There was here an evident contrivance to defeat the *supersedeas* which the court had granted, but we are bound to see that the prisoner is discharged.

Rule absolute.



## DOYLE V. BERGIN.

*Fieri facias—Return.*

It is not improper for a sheriff to return to a writ of *fi. fa.* that he has made the money *and paid it over to the plaintiff's attorney*, the words in italics being mere surplusage.

A sheriff returned to a *fi. fa.* that he had made the money and paid it to the plaintiff's attorney.

The plaintiff applied that the sheriff be ordered to strike out that part respecting paying over the money as irregular; not, however, on oath denying the truth, but stating that it is not true.

*Per Cur.*—It is not improper: if false, it is not conclusive: we ought not to meddle with it. If irrelevant, it is mere surplusage, and may be rejected.—See B. & B. 77: 4 Moo. 505.

Rule refused.

## BLAIR V. BRUCE.

A replication *de injuriâ* to a justification under a warrant is good.

Upon this demurrer the single question was, whether a replication of *de injuriâ* to a justification by a constable under a warrant of commissioners, to levy a fine imposed on a township officer for not taking the oath of office, is good, or whether there should not be a special traverse of some one material fact.

*Per Cur.*—Bardons v. Selby (9 Bing. 756), in the Exchequer Chamber, settles the question that such replication is good, by the unanimous judgment of the court. The King's Bench had given the like judgment in the case, Lord Tenterden, C. J., dissenting, and their judgment was affirmed. 12 Mod. 582, and other authorities of early date, would lead to a contrary conclusion; but in the case of Bardons v. Selby the point is settled upon a solemn judgment in the Exchequer Chamber, and the reasoning is strong in support of that judgment.

Judgment for the plaintiff.



## WILCOX V. BURNSIDE.

*Malicious arrest—Averment of determination of former suit, and endorsement of ca. re.*

In a case for malicious arrest the determination of the suit is sufficiently averred by stating that "the plaintiff (the defendant in the original suit) recovered a certain sum for damages and costs," under the provincial statute 2 Geo. IV. ch. 5, allowing a verdict and judgment for defendant in set-off, "and that the defendant was in mercy, &c.," without averring also, "that the defendant took nothing by his writ;" and an averment that the defendant maliciously obtained a judge's order to arrest the plaintiff, and issued a writ of *ca. re.*, and indorsed it for bail, shews sufficiently that the writ was endorsed under the order.

This action was for a malicious arrest. The declaration contained four counts, in all of which it was stated that the plaintiff was arrested upon a *ca. re.* in a plea of *trespass on the case upon promises*, and the termination of that action was alleged in this manner: "And the said plaintiff further saith that such proceedings were thereupon had in the said suit; that afterwards viz., &c., it was considered in and by the said court that the said plaintiff should recover against the said defendant his damages by the jury in that behalf assessed, to wit, the sum of £235, and also £50 0s. 9d. for his costs and charges, by his Majesty's said court adjudged, of increase to the said plaintiff, and with his assent, and that the said defendant should be in mercy, &c."

By the words plaintiff and defendant as used here was meant the plaintiff and defendant in this action for the malicious arrest; and the effect of the averment was, that the defendant in the original action recovered by the judgment of the court £235 damages against the plaintiff in that action, and also £50 costs of increase, and that the plaintiff was adjudged to be in mercy &c.

The 4th count stated that defendant, on the 4th day of July in the year aforesaid, intending &c., maliciously caused to be sued out of His Majesty's Court of King's Bench a writ of *capias ad respondendum* at the suit of the defendant against the plaintiff, directed &c., in a plea of *trespass on the case on promises*; and that the defendant maliciously and without probable cause, under pretence that the plaintiff was justly indebted to the defendant in £275, afterwards applied to the Chief Justice of the Court of King's Bench, and prayed him to make an order to hold



the plaintiff to bail for £275; and thereupon the defendant maliciously, and without probable cause, procured the said Chief Justice to make his order to hold the plaintiff to bail for £275, and that said defendant afterwards, and before the arrest, maliciously caused the said writ to be endorsed for bail for £275, and afterwards caused the plaintiff to be arrested thereon.

The defendant demurred specially to the three first counts, assigning for cause that the first action was not shewn to have been legally or sufficiently determined, but stated only as an inference from the fact that the plaintiff recovered damages and costs and that the defendant was in mercy &c.; and that it was not alleged that the defendant was adjudged to take nothing by his writ; and that it was not averred that the plaintiff could legally recover any damages or costs of increase in the first suit.

To the fourth count the defendant also demurred specially for the same causes, and for the additional cause, that it was not alleged that the writ was indorsed for bail under the order of the Chief Justice, or that the writ was sued out or prosecuted under the authority of the said order; and that it was not shewn that the writ was legally obtained, or that any writ was obtained after the making of the judge's order, and that on that account the action should have been in trespass, and not in case.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the objections, which apply to all the counts, we are of opinion that they are not good grounds of demurrer.

The first action is sufficiently shewn to have been determined by the entry of a final judgment in favor of the defendant in that suit. If there were irregularity or error in adjudging damages to the defendant with costs of increase to be recovered of the plaintiff, the judgment should have been set aside or reversed. It stands at present a subsisting judgment of this court, final between the parties, and we are not, in this action, to pronounce it to be irregular; but we see nothing wrong in the entry of that judg-



ment. Our statute 2 Geo. IV. ch. 5, authorizes the jury to render a verdict for the defendant where his set-off exceeds the plaintiff's demand, to the amount of such excess, "and the defendant is to be allowed to enter up judgment *for such sum, besides his costs and charges.*" This action is in trespass on the case; and we do not know how the statute could be more properly carried into effect than by entering the judgment as it has been done in this case. Damages were always recoverable at the common law in trespass on the case for non-performance of a contract: it is an action sounding in damages; and we must take the plain meaning of the statute to be that the defendant may recover, if he proves a balance in his favor, upon a similar judgment as the plaintiff would be entitled to if he succeeded, and shall have a similar execution, for no other would be consistent with the form of action. This demand must be of the same degree, or he could not set it off: and this right of recovery, given to him by the statute, is a sort of accessory to the plaintiff's action, and must follow the nature of that action. Then as to costs, the statute gives them: and this act of ours must, in this point, be construed in connection with the statute of Gloucester, in which it is expressly enacted that the provision giving costs together with damages "*shall hold place*" in all cases where the party is to recover damages; so that, although the statute of Gloucester had only demandants and plaintiffs in view, yet, when by our statute the defendant is enabled to recover damages, the equity of the statute of Gloucester would, we conceive, give him costs together with his damages. The action of replevin affords a strong analogy. As soon as the avowant was allowed to recover damages, his right to costs was held to follow under the statute of Gloucester; but our statute makes express provision, and gives the defendant his cost and charges, and, of course, he must at any rate have had them under the statute 4 Jac. I, ch. 3, and 23 H. VIII., ch. 15, to be taxed and adjudged as to the plaintiff if he had succeeded—that is, by way of increase to his *damages*. But the substance of the thing is, that the defendant was clearly entitled to the amount of the



verdict and his costs and charges; and, it in the entry of the judgment on the verdict any error in form has intervened, it would be the error of the clerk, and must have been amended at once if the plaintiff had pointed it out. We could not hold the judgment void on that account.

The same answer must be given to the objection of the plaintiff in the suit being adjudged to be *in mercy*. It is not a cause of error to enter a judgment of *misericordia* irregularly, or that the plaintiff is adjudged to be *in misericordia* instead of the defendant. The want of a *capiatur* or *misericordia*, or the substitution of one for the other, is aided by the Statute of Jeofails.—2 H. Bl. 312. It is sufficient to say generally “that the said suit was ended and determined”—3 Ld. Raym. 300; and when a legal ending of the suit by judgment in favor of the defendant is shewn to us, it is enough without it being made appear to us that the plaintiff was adjudged to take nothing by his writ.

With respect to the causes of demurrer—which apply only to the last count—our process to bring the defendant into court in all cases is by *capias ad respondendum*; and therefore the writ of *capias* might regularly issue before, or without any judge's order. It could not legally be indorsed to take bail without the ordinary affidavit, or, in a special case, without a judge's order.

The malicious injury alleged here is the obtaining such an order without cause, and afterwards indorsing the writ with direction to take bail. Such indorsement, I think, is sufficiently stated to have been made by virtue of the judge's order; no other inference can reasonably be drawn from the statement.

It is usual to express in the *præcipe* that the writ required is a bailable writ—referring to the affidavit filed, and the sum sworn to; from thence it may be argued that the authority for taking out bailable process should precede the suing out of the *capias*, and that otherwise the writ is irregular. We do not perceive that this consequence must follow. The statute, 2 Geo. I. ch. 29 requires nothing to be done by the officer at the time of issuing the *capias* which would distinguish a bailable from a non-bailable writ, and



we see no substantial reason why the plaintiffs' attorney, after suing out his *capias* in the ordinary form, may not file a proper affidavit, or obtain a judge's order, and then indorse it for bail. However, this is not material to be considered—because, if for this cause the *capias* was irregularly sued out, the defendant's act would not be the less a malicious injury, for which case would lie.

Judgment therefore is to be entered for the plaintiff on this demurrer.

Judgment for the plaintiff on the demurrer.

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### TRUSCOTT ET AL. V. BILLINGS.

*Bill of exchange—Accommodation—Money lost.*

Where the plaintiffs, who were bankers, requested the defendant to draw two bills on England for their accommodation, which he did, and the plaintiffs endorsed and sold them here, giving the defendant a draft of the same amount payable in England, to meet them when due, and the defendant, for that purpose, transmitted the draft to the drawee of the bills, an officer in the customs, by whom it was discounted before it became due, and the money placed by him with the public monies left in his charge, from whence part of it was stolen; and, in consequence, one of the defendant's bills came back protested, and was paid by the plaintiffs on the defendant's check, they being his bankers, and afterwards charged to him in account.

*Held*, that although it was an accommodation transaction, the drawee was the agent of the defendant and not of the plaintiffs, and that the defendant was responsible to them for the amount of the bill.

The plaintiffs were bankers, and sued the defendant for a general balance, due upon his banking account with them. The defendant pleaded the general issue, and a plea of set off; and, at the trial, he contended that the plaintiffs were in his debt, for that the balance of the banking account, though apparently against him, as the plaintiffs had made it out, was truly in his favor by the sum of £118 4s. 2d., for which, with interest, he claimed a verdict in his favor as allowed by our statute.

The plaintiffs claimed a balance in their favour of £474 4s. 11d., besides interest, which the defendant resisted as unjust, on this ground—that they charged him with a sum of £666 3s. 3d. paid by him upon his check on the 3rd of March 1835, as if it were money lent or advanced to him by the plaintiffs, when in reality it was a sum which they were liable to pay in consequence of a loss arising in a transaction in which they, and not he, were



the persons interested; that by making himself party to a bill of exchange at their request, and purely for their accommodation, he had rendered himself liable to bear this loss in the first instance, because he was immediately responsible to the holder of the bill, which under peculiar circumstances had been protested; but that to meet the demand of the Bank of Upper Canada, who were the holders of the bill, he had drawn in their favor upon the plaintiffs for the amount which they had paid, as they were bound to do, on their own account, not on his; and that there was no pretence for their now seeking to make this payment an item of charge in their account against him.

The facts of the case are stated in the judgment of the Chief Justice.

ROBINSON, C. J., delivered the judgment of the court.

Upon the right of the plaintiffs to insist upon this charge, the case wholly turns. An unfortunate occurrence with respect to the bill spoken of has happened, without any wilful wrong on either side. It has occasioned a loss which one or the other of them must sustain, and as each party is conscious that the misfortune did not happen by his fault, it is not surprising that there is an unwillingness on both sides to put up with the loss.

In October 1834, the plaintiffs were carrying on the business of banking in Toronto, discounting bills and notes and paying out their own promissory notes, payable on demand, in the nature of bank notes.

The defendant was willing, as a friend, to promote their interests, and to assist them in their commencement in putting their paper money into circulation, in exchange for the notes of other banks, which being redeemable on demand by specie, were the same in their hands as gold and silver. Being in the way of receiving and paying out considerable sums of money as a public officer, he made his payments in the plaintiffs' paper, which he got from time to time at their banking house, and replaced it by drawing on the Bank of Upper Canada, where he kept his cash, and this gave the plaintiffs an equal amount in Upper Canada Bank bills, which they could at their pleasure



convert into specie. A long course of such transactions shewed the spirit of accommodation in which the defendant acted towards the plaintiffs, and threw light upon the particular transaction out of which this difficulty has arisen, although, in point of time, these exchanges of notes did not begin till afterwards, and the business out of which this litigation has sprung seems to have been the first that was transacted between these parties.

In October 1834, the Receiver General of this province, having contracted a large loan in England for public purposes, had occasion to negotiate sterling bills, in order to draw the amount, and he advertised for tenders for those bills, that he might secure the highest rate of premium on the exchange. The plaintiffs became the purchasers, and the Receiver General sold them his bills accordingly. It seems it was suggested to the defendant, that by drawing bills upon his brother in England to the amount of £1000, and selling them here, he might obtain that sum in the money of other banks, and hand it over to the plaintiffs; and that to enable him to draw with safety, they could transfer to him one of the bills of the Receiver General upon England for £1000, which being remitted to his brother, on whom he was to draw, would put him in funds to meet the defendant's bills. For reasons which were stated in the argument, but which it is not necessary to repeat, it was not necessary or desirable for the plaintiffs to exchange the Receiver General's bill for money by a direct transaction here.

The defendant assented to what was proposed, and on the 13th of October, 1834, he drew on his brother William Billings in London, at 30 days sight, in favor of the cashier of the Bank of Upper Canada, or his order, for £500 sterling, which bill he sold to the Bank of Upper Canada. On the same day, he drew on William Billings another bill at 30 days sight, in favour of the Commercial Bank, for £500 sterling, for which bill he also obtained the value from the Commercial Bank, and both the sums obtained for these bills were handed over by him to the plaintiffs within two days from the time of his drawing and negotiating them,



or about the 15th of October. On that same day, the plaintiffs indorsed and delivered over to the defendant a sterling bill of the Receiver General, on Messrs. Thomas Wilson & Co. of London, for £1000, dated the 10th of October, and payable at 30 days sight.

This bill the defendant remitted to William Billings, advising him of his having drawn the two £500 bills, which the proceeds of the bill on Thomas Wilson & Co., would enable him to meet.

The £500 bills being given here to different persons, were sent at different times, and came to different hands in England. The bill on Thos. Wilson & Co., arrived before either of them was presented to William Billings, and for particular reasons he was anxious to avoid the necessity of making a formal acceptance of them when they might come to hand. He was an officer in charge of a department in the custom house, and was bound by his instructions to abstain from all mercantile transactions, and was prohibited at the peril of losing his office, from contracting debts which he could not pay.

From a scrupulous anxiety to observe his instructions, and to avoid the remotest risk, and willing at the same time to meet the defendant's wish, he resolved to place himself in a situation to pay the bills promptly, in order that he need not be under acceptance. When the £1000 bill came to him, he got it accepted by Wilson & Co., and on that same day, or the day after, the £500 bill which the Commercial Bank had purchased, was presented to him by Brown & Co. of London. He explained to Brown & Co. his desire to avoid accepting, and his wish to take up the bill instantly, and it was agreed that he should discount with Brown & Co. the acceptance of Wilson & Co. for the £1000, which was accordingly done; and Brown & Co. retained £500 to pay the bill in their hands, and paid over to William Billings £498 5s., deducting £1 15s. for the interest on the other £500, for the time that the bill on Wilson & Co. had yet to run. This took place about the end of November. Brown & Co. paid William Billings through their bankers the £498 5s., in four £100 notes of



the Bank of England, and £98 5s. in other money; and William Billings took this and deposited it in his desk at the custom house, that he might have it ready to take up the other £500 bill whenever it might be presented. After a few days, the bill not appearing, and being uneasy at keeping so large a sum in his desk, he deposited the four £100 bills in the public chest of the King's Receiver of Fines in the custom house, marked as his private money; keeping the £98 5s. in his own possession. About eight or ten days after this, on the 27th of November, 1834, and before the £500 bill made its appearance, the chest of the Receiver of Fines was robbed of all the money it contained, £5000 and upwards, including the £400 deposited by William Billings. In September following, two of the bills were traced to have been passed at Lisle & Brussels, and this led to the detection of the offenders, who were convicted at the Old Bailey, William Billings having been instrumental in their detection and prosecution.

In the mean time, on the 2d of December, 1834, the second £500 bill arrived, and was presented, and William Billings, being thus left without funds to meet it, answered: "the provision for the bill was duly provided and sent to me *by the drawer*, and placed for security in the King's chest at the custom house, waiting the arrival; but this money having been feloniously abstracted on the 28th of November last, I am not able to pay it."

When it came to maturity it was again presented for payment, and the same answer being given, it was returned to Canada under protest.

The damages, re-exchange, interest and charges added to the bill, made an amount of £666 3s. 3d., which the Bank of Upper Canada, the holders of the bill, demanded of the defendant; and on the 3rd of March, 1835, he gave his check on the plaintiffs for that exact sum in favor of the Bank of Upper Canada, which they paid.

The defendant, before the plaintiffs commenced their business as bankers in Toronto, and for some time after, kept his cash at the Bank of Upper Canada; and it does not appear that he had any transactions of business on his own



account with the plaintiffs for some months after October, 1834, when he had the transaction about the bill.

On the 17th of February, 1835, he transferred his cash account from the Bank of Upper Canada to the plaintiffs, and thenceforward banked with them, removing on that day the balance that stood in his favor with the Bank of Upper Canada, £698 5s. 11d., to the plaintiffs' bank. So that his drawing a check on the plaintiffs to pay the Bank of Upper Canada the bill and charges upon it, and their paying it, must be taken in connection with these facts. The plaintiffs contend it was an ordinary transaction of drawing by him on them as his bankers; the defendant desires it to be inferred that he drew only because they were bound to pay the demand, and that by their accepting and paying his draft they admitted their liability.

Upon this point, it is to be observed that according to the entries in the defendant's banking book with the plaintiffs, called the pass-book, there was a balance against the defendant on his account of £27 5s. 3d., on the 3rd of March, 1835, when the plaintiffs accepted and paid his check of £666 3s. 3d. to cover the loss in question.

It is very important to the case to know in what spirit and with what intention this sum was paid by the plaintiffs; on this point no positive evidence is given—nothing verbal or in writing is shewn to have passed between them; we are left to conjecture from circumstances.

It may have been from the conviction that the plaintiffs, upon the understanding between them and the defendant, were to bear the loss; or it may have been actually an accommodation to the defendant, a mere allowing him to overdraw; which, if his credit were undoubted, the plaintiffs might the more readily do, from a wish to lighten the inconvenience of the loss he had sustained. But there is a difficulty from the circumstances in founding any inference on this point.

It was proved on the part of the defendant, that before the 17th of February, 1835, when he transferred his account to the plaintiffs' banking house, there had been no business transactions—no pass-book kept—no bank account made up, as is usual with those who make deposits, and for



some time not even any check given by defendant for the sums which he took out from time to time to be exchanged for other money for the plaintiffs' accommodation.

The plaintiffs' account, he contends, as it is now exhibited, was all made up after they had heard of the difficulty in England; and in order to give a color to their case the monies taken out for exchange, and the drafts given to replace it, were all (as he contends) collateral transactions, not brought or intended to be brought into account; and that any sum accidentally lying with him before he had an opportunity for paying it out, to be replaced by a draft on his own bankers, was not a debt due by him, but the plaintiffs' money left in confidence with him for a purpose well understood.

Casting these matters out of the banking account, it will appear, as he says, that on the 3rd of March, 1835, he had a balance in their hands more than sufficient to cover the check of £666 3s. 3d. This, on the other hand, weakens the inference of the plaintiffs' acquiescence in the loss by answering his check; but, on the other, the defendant contends it makes materially in his favor on this ground; that he proved by one of the plaintiffs' witnesses that when the check was presented there was a hesitation in paying it, which could hardly have been if it were simply the case of a customer drawing for his money; and, after some hesitation, one of the plaintiffs ordered it to be paid; from which the defendant argues, that the hesitation could only have arisen from a reluctance to acknowledge their liability in the first instance, which was ultimately waived.

The plaintiffs, on the other side, adhere to their mode of stating the account, charging the defendant with all sums he had received, in order to put away; and, mixing these with his subsequent business transactions, there would be on the 3rd of March a small balance against the defendant, which would satisfactorily account for not answering his check for £666, as a matter of course.

Another circumstance in the cause is the paying over by W. Billings, in London, of the remaining £100 (not stolen), which he is shewn to have done by the instructions of the defendant, paying it to the plaintiffs' bankers in London.



and taking their receipt as for £100 paid them *by the plaintiffs*.

For this sum, making with the exchange £120 here, the plaintiffs give the defendant credit in account, not admitting that it was otherwise paid or received than as a mode of conveying the amount to the defendant, and the contrary is not shewn—the fact is barely left to speak for itself.

And, upon the whole complexion of the evidence, it appeared to me that there was no sufficient ground for inferring an acquiescence in the loss on the part of the plaintiffs; on the contrary, they seem to have been careful to avoid committing themselves by any acknowledgment of liability; and if they were not so, it is difficult to understand how the defendant should be without the means of shewing it, either by evidence obtained here or in England; for if they submitted, they would no longer have any motive for reserve, and the defendant in so large a transaction, one would suppose, would have been careful to see that the money was expressed to be so paid by the plaintiffs as not to seem a mere advance made on his own account.

After the evidence had been given, which consisted of testimony given in England under a commission and by witnesses examined *viva voce*, I recommended to the jury to find for the plaintiffs, in order that the amount might be ascertained by their verdict, reserving leave to the defendant to move to enter a verdict for the sum that would be due him on the balance of his account, if the court should be of opinion that the legal effect of the evidence was to make the plaintiffs liable to indemnify him against the protested bill; or, in other words, that the money lost in England was the plaintiffs' money, and not the defendant's. And, to assist the court in coming to a conclusion on this point, I requested the jury to consider whether the bills for £500 were drawn merely for the accommodation of the plaintiffs, to procure them funds by discounting them; and whether the £1000 bill was taken by the defendant to cover the amount of the two bills with the defendant's agent in England, and was not otherwise purchased than as it was taken to create the funds on which the defendant, for the plaintiffs' accommodation, drew in England, or to replace them.



The jury found this in the affirmative. I put it to them because the plaintiffs desired to have it understood that the £1000 bill was simply sold to the defendant in the way of an ordinary mercantile transaction.

I did not think it fair towards the parties to ask the jury to find whether the defendant was in the whole transaction merely the agent of the plaintiffs, because that would have been inviting them to draw a legal inference from facts that were undisputed, and would be leaving the rights of the parties to be settled by their arbitrary finding upon a point of law, which it was the business of the court to decide.

The jury retired for some time, and upon coming into court manifested a strong reluctance to find even a conditional verdict for the plaintiffs, being no doubt struck with the hardship of the defendant being left to suffer so considerable a loss, in a matter in which he had engaged for no purpose of his own, but solely to serve the plaintiffs. They were evidently inclined to find for the defendant. I explained to them that it was quite in their power to do so; that the matter must eventually depend upon the opinion of the court on the legal consequences of what had taken place, and that I had only recommended a verdict for the plaintiffs as the more usual and convenient course, where a legal question remained for discussion. They retired again and brought in a verdict for the plaintiffs, waiving, I suppose, their inclination to find a general verdict for the defendant in deference to the explanation they had received.

We are now to determine upon this evidence, taken in connexion with the finding of the jury, whether there is any sufficient reason why the £666 3s. 3d. paid by the plaintiffs upon the defendant's request, should not be charged against the defendant. It is very possible (though I do not assume it) that if we were fully in possession of all that passed between these parties in relation to the transaction about the £1000 bill, both before and after the loss in England was known, we might see some clear ground on which we could rest a judgment in favor of the defendant upon this point. It may have been the case that the plaintiffs received the accommodation upon the express understanding that



the defendant should be at no loss, under any possible circumstances ; that he was to be regarded all the way through as the mere agent of the plaintiffs, acting under their direction ; and if, in addition to this, it were shewn to us that the defendant, acting as agent for the plaintiffs, was to incur no responsibility, even where he deviated from the ordinary course of business, then we might find the case free from difficulty ; but we have no warrant for assuming this ; it would be mere conjecture. There is no evidence to that effect, and we must decide the law upon the evidence as it stands.

Now looking at the case as I have stated it, we are not clear that there is any conclusive reason, apart from the special finding of the jury, for regarding the defendant in any other light than the purchaser of the bill on Wilson & Co. He gave value for it ; he took it as the indorser, and remitted it as he pleased and where he pleased. It is very true, he seems to have no motive of personal interest for taking it, and it may be granted that he did take it entirely to oblige the plaintiffs ; still, we cannot say that the motive by which he was influenced to assent is at all material, after he did assent ; nor do we perceive that having agreed from mere kindness to engage in a transaction which led to his exchanging the proceeds of two bills sold here for one of equal amount in England, he can on that account stand exempt from the ordinary consequences of such an exchange, when made upon other motives.

However, the jury have found that he did not purchase the bill, in the ordinary sense, but merely took it as the means of creating funds to answer the two bills he had drawn, and we must consider the question on that footing.

It may seem equitable that the plaintiffs should not suffer the defendant to abide by this loss : but the question with us is not what the plaintiffs ought in point of generosity to do, but what they can be legally held to do, whether they be willing or not.

If it seems just that the defendant should be indemnified by the plaintiffs against this loss, it can only be because he sustained it in consequence of agreeing to do a good



natured act solely for the accommodation of the plaintiffs, and in no degree for any purpose of his own; but neither courts of law nor equity could adopt such a principle as a rule. Many cases might be supposed in which the same plea could be urged, but where it is manifest the hardship must be suffered by the person doing the friendly act. I might be asked, for instance, to lend a friend a sum of money without interest, and being willing to do so, might direct a brother to sell out of the funds in order to realize the money. If the brother, having received the money, were to spend it, or lose it, or be robbed of it, I do not know on what legal principle I could call upon the man to whom I intended to lend it to make it good, although it would be quite clear that my loss was occasioned purely by an act of kindness to him.

The case comes to this, that the defendant having drawn and discounted two bills on England and given the plaintiffs the proceeds, took the plaintiffs' bill on England for £1000 in return; and though that bill was remitted by him to produce funds for meeting the other bills, rather than for replacing an advance to be made, in the first instance, from his own funds, still the bill was no less his. He might, for all that appears in evidence, have remitted it or not as he pleased; he might have sold it to another, and if he had done so at an increased rate of exchange, could the plaintiffs have made him account for the difference? If he had not remitted it, and the other bills had been protested in consequence, he must have borne all the consequences, and the plaintiffs could have said truly, we have done all that was incumbent upon us to enable you to meet your engagement. If the bill had been lost, the loss, for all that we can see, must have been the defendant's. And though we have said it might seem equitable that the plaintiffs should bear this loss, yet knowing only what is known to us of the case, we cannot say that equity is with the defendant.

The plaintiffs gave full value for the two bills. The sterling bill produced the money, which was lost from the unforeseen and unusual circumstance of its being drawn before it was due, and placed in custody where it need not and should not have been. If, in fact, the bill on Wilson &



Co. was given to the defendant as agent to the plaintiffs, merely to send home and receive the money, then the defendant should not have sold it before it came to maturity. By discounting it through his agent, he seems to have made it his own.—(Giles et al. v. Perkins et al., 9 East 12).

Then the difficulty, besides, is really owing to the defendant, or rather his agent, desiring to pay his own bills before they came to maturity, which is not a natural consequence arising from the transaction he entered into with the defendant.

The defendant's case might be supported in two possible views of it. 1st. If we could say that the evidence shewed him to be merely acting for the plaintiffs as their agent in the whole matter, on the understanding that he was to incur no pecuniary responsibility, even if he or his sub-agent deviated from the usual course of business—or, 2ndly, if the plaintiffs, after the loss was known, shewed, by their conduct or admissions, that they acquiesced in the loss falling upon them; though this indeed resolves itself into the first, since it would merely supply proof that such had been the understanding.

But we have no authority to hold that W. Billings was the agent of any one but the defendant, even if the defendant were in this matter agent of the plaintiffs. An inferior agent's accountability is to his immediate employer and not to the principal; and if the loss occurred from W. Billings deviating from the usual course of business, the defendant would be liable, on general principles, for that loss.

If the plaintiffs had simply engaged that they would have the money in England by the day to meet the defendant's bills on his brother, and had accordingly placed the money in his hands, and he had lost or spent it, it would be absurd to say that the plaintiffs must pay the money a second time. The sum of the matter is, that the defendant lent the plaintiffs £1000 here, to be repaid in England, and it was repaid in England sooner than was necessary, to suit the purpose of the defendant's agent, and after its receipt the money was lost.



If we could say with propriety that the plaintiffs sent this £1000 bill to England, through the defendant, to answer the other two bills, then, if W. Billings, acting for the defendant, had refused to accept the bills, and the plaintiffs had afterwards taken them up, they could have reclaimed the £1000 bill, as their bill sent for a purpose for which it was not used. There are many cases arising from bankruptcy in which the question has occurred, whether a bill sent to the bankrupt for a particular purpose formed part of his effects, at the time of his bankruptcy, or remained the property of the person for whom it was sent; and much that is said in these cases is in its spirit applicable here. We refer to a case of *Tooke v. Hollingworth* (5 T. R. 215). See also 1 East 552; 2 Bla. 1154; 1 Atk. 233; 5 T. R. 494.

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#### BANK OF UPPER CANADA V. COVERT ET AL.

*Principal and surety—Change of office for which security is given—Surety no longer responsible.*

A surety by bond for the due performance of the office of bank agent is not responsible for losses occurring after the nature of the agency has been changed, and the agent appointed a cashier.

The defendants were sued as sureties for James Gray Bethune, upon their bond, dated 21st August, 1830, in the penalty of £2,000, with the following condition:—  
 “Whereas James Gray Bethune hath been appointed agent of the Bank of Upper Canada at Cobourg, in the said district of Newcastle, and hath been required by the president and directors thereof to give good and sufficient security for the due performance of his duty. Now the condition of the above written obligation is such, that if the said James Gray Bethune shall and do faithfully and diligently, to the best of his skill and understanding, demean himself as agent of the said Bank, and shall and do, as often as he shall be thereunto required by the president and directors thereof, render a true, just, and full account of all the bills, notes, monies, and other things committed to his charge, as such agent as aforesaid; together with all interest and profits arising thereupon, and paid to him by such person or persons as shall from time to time transact business with him, as agent for the said



Bank ; and shall in all things obey and observe the instructions which shall from time to time be transmitted to him by the President and Directors of the said Bank of Upper Canada, touching or concerning the business by them confided to his charge, then this obligation shall be void ; otherwise, remain in full force and virtue."

Breach : non-performance of condition, &c.

At the trial, before *Robinson*, C.J., the following facts were proved :—

Up to September the 12th, 1832, Mr. Bethune had conducted what is called an agency office of the Bank of Upper Canada at Cobourg ; and on the 28th of June in that year, the cashier of the Bank at Toronto wrote to him for the purpose, as he expressed it, "of ascertaining as early as possible his opinion respecting a proposed *change in his agency* ; telling him that it was probable a regular office would be established at Cobourg, and that he would be offered a salary of £300 per annum, in lieu of all charges for commission, &c.—that the office would be furnished by the Bank with books and stationery, and no doubt a vault and iron chests would be provided, the same as at Kingston and the other offices." "You will, I think, find your duty (he added) much easier and more satisfactory under this arrangement, than the present system ; besides, you will be able, by keeping a credit-book, to ascertain, at any moment, the state of every person's discount, the amount he owes the Bank, and who are his securities or indorsers. Besides, the office will only be open at stated hours—viz., from 10 to 3 o'clock, the same as at other places—which will save you much harassing business, which you now go through with at all hours of the day."

This letter Mr. Bethune answered on the 30th of June, saying that, on the same day (28th June), he had written to the president on the very subject which the cashier had suggested—and he adds, "I shall be satisfied with any allowance, in preference to the *present harassing* system."

On the 31st of July, the cashier wrote again to Mr. Bethune, acknowledging this letter from him, and also the receipt of the letter to the president, and said that they had both



been submitted to the Board. The Board had also, he said, been considering whether it would not be more advisable for Mr. Bethune, and for the Bank also, if they established at Cobourg a regular office, with the usual bank-books, &c., similar to that they have now opened at Hamilton—and suggested the advantages. “If, therefore,” he said, “you concur in this change, and are willing to undertake an establishment similar to the one alluded to, or to the other offices, the Bank will allow a salary of £300 per annum, on your finding an office and everything necessary, books and stationery excepted;” and he added that, whenever there should be stockholders competent and eligible, he might have a board, so as to discount notes within the district.

On the 10th of August, the cashier again wrote to Mr. Bethune, referring to a letter from him; and in this he said—“I observe that, owing to various circumstances, you will not be able to enter fully upon the duties of your office for some weeks yet, as you cannot at present spare Mr. Kitson to visit this place for the purpose of acquiring a knowledge of our books.” And, on the 13th of August, he again wrote to him—“As soon as you can make it convenient, it will be desirable that your office should go into operation.”

On the 25th of August, the cashier wrote to Mr. Bethune, stating that Mr. Kitson had arrived, and was making progress in learning their books—and expressing his expectation that there would be little difficulty in his acquiring the information, and that their method of keeping the discount-books would be found easy and correct on trial.

On the 8th of September, 1832, the cashier wrote to Mr. Bethune as follows:—“You will no doubt be prepared, next week, to open your office on the new system. I have to request that all notes received by you, either as renewal or new notes, may be drawn payable at your office, of which you will furnish, weekly, a separate discount-sheet for each: the one for renewals will be accompanied by your letter, stating the several instalments paid, and the sheet will be returned approved, and at the same time



the original notes to which they appertain will be charged in full against your office, and sent down; and this course will be followed up for the ensuing three months, *until the whole of the notes belonging to your late agency shall be gradually transferred over to your office, and each will be entered in your credit-book accordingly.* Your discount-sheet for new notes will be accompanied by your letter of remarks thereon, to be laid before the Board. I beg to inform you that your salary as cashier commences from the 1st instant, and will be payable quarterly, &c., on &c., at which periods you will charge the same against the Bank, in account, and transmit your receipts."

In November, the cashier sent him an iron chest for the use of his office; and on the 20th of December, 1832, he wrote to him—"You will charge your salary, from the 1st of September last, at £100, and place the balance of profits at credit of the Bank."

These letters were produced, on the part of the defendants, to show that after they became security for Mr. Bethune as Bank agent he received a new office or appointment as cashier—that to this office their security did not extend—and that they were not liable for any of his defaults in the capacity of cashier.

The cashier of the Bank of Upper Canada was examined as a witness at the trial, and was strictly questioned as to the nature of Mr. Bethune's duties while agent, and as to the change (if any) made in his situation and duties when he was appointed cashier of the bank at Cobourg. The general effect of the cashier's evidence was to represent the duties and liabilities of Mr. Bethune to be the same in both cases; that the business was not increased, as he thought, by the change made in September, 1832,—and that the only difference was, that the form of his account was altered, and that he received a stated salary instead of being remunerated, as before, by a commission, which yielded him about the same income; that neither situation was conferred otherwise than by a letter; that his responsibility was not increased, in regard to money or liability for incidental losses; that no board of directors had been



The jury found this in the affirmative. I put it to them because the plaintiffs desired to have it understood that the £1000 bill was simply sold to the defendant in the way of an ordinary mercantile transaction.

I did not think it fair towards the parties to ask the jury to find whether the defendant was in the whole transaction merely the agent of the plaintiffs, because that would have been inviting them to draw a legal inference from facts that were undisputed, and would be leaving the rights of the parties to be settled by their arbitrary finding upon a point of law, which it was the business of the court to decide.

The jury retired for some time, and upon coming into court manifested a strong reluctance to find even a conditional verdict for the plaintiffs, being no doubt struck with the hardship of the defendant being left to suffer so considerable a loss, in a matter in which he had engaged for no purpose of his own, but solely to serve the plaintiffs. They were evidently inclined to find for the defendant. I explained to them that it was quite in their power to do so; that the matter must eventually depend upon the opinion of the court on the legal consequences of what had taken place, and that I had only recommended a verdict for the plaintiffs as the more usual and convenient course, where a legal question remained for discussion. They retired again and brought in a verdict for the plaintiffs, waiving, I suppose, their inclination to find a general verdict for the defendant in deference to the explanation they had received.

We are now to determine upon this evidence, taken in connexion with the finding of the jury, whether there is any sufficient reason why the £666 3s. 3d. paid by the plaintiffs upon the defendant's request, should not be charged against the defendant. It is very possible (though I do not assume it) that if we were fully in possession of all that passed between these parties in relation to the transaction about the £1000 bill, both before and after the loss in England was known, we might see some clear ground on which we could rest a judgment in favor of the defendant upon this point. It may have been the case that the plaintiffs received the accommodation upon the express understanding that



the defendant should be at no loss, under any possible circumstances ; that he was to be regarded all the way through as the mere agent of the plaintiffs, acting under their direction ; and if, in addition to this, it were shewn to us that the defendant, acting as agent for the plaintiffs, was to incur no responsibility, even where he deviated from the ordinary course of business, then we might find the case free from difficulty ; but we have no warrant for assuming this ; it would be mere conjecture. There is no evidence to that effect, and we must decide the law upon the evidence as it stands.

Now looking at the case as I have stated it, we are not clear that there is any conclusive reason, apart from the special finding of the jury, for regarding the defendant in any other light than the purchaser of the bill on Wilson & Co. He gave value for it ; he took it as the indorser, and remitted it as he pleased and where he pleased. It is very true, he seems to have no motive of personal interest for taking it, and it may be granted that he did take it entirely to oblige the plaintiffs ; still, we cannot say that the motive by which he was influenced to assent is at all material, after he did assent ; nor do we perceive that having agreed from mere kindness to engage in a transaction which led to his exchanging the proceeds of two bills sold here for one of equal amount in England, he can on that account stand exempt from the ordinary consequences of such an exchange, when made upon other motives.

However, the jury have found that he did not purchase the bill, in the ordinary sense, but merely took it as the means of creating funds to answer the two bills he had drawn, and we must consider the question on that footing.

It may seem equitable that the plaintiffs should not suffer the defendant to abide by this loss : but the question with us is not what the plaintiffs ought in point of generosity to do, but what they can be legally held to do, whether they be willing or not.

If it seems just that the defendant should be indemnified by the plaintiffs against this loss, it can only be because he sustained it in consequence of agreeing to do a good



natured act solely for the accommodation of the plaintiffs, and in no degree for any purpose of his own; but neither courts of law nor equity could adopt such a principle as a rule. Many cases might be supposed in which the same plea could be urged, but where it is manifest the hardship must be suffered by the person doing the friendly act. I might be asked, for instance, to lend a friend a sum of money without interest, and being willing to do so, might direct a brother to sell out of the funds in order to realize the money. If the brother, having received the money, were to spend it, or lose it, or be robbed of it, I do not know on what legal principle I could call upon the man to whom I intended to lend it to make it good, although it would be quite clear that my loss was occasioned purely by an act of kindness to him.

The case comes to this, that the defendant having drawn and discounted two bills on England and given the plaintiffs the proceeds, took the plaintiffs' bill on England for £1000 in return; and though that bill was remitted by him to produce funds for meeting the other bills, rather than for replacing an advance to be made, in the first instance, from his own funds, still the bill was no less his. He might, for all that appears in evidence, have remitted it or not as he pleased; he might have sold it to another, and if he had done so at an increased rate of exchange, could the plaintiffs have made him account for the difference? If he had not remitted it, and the other bills had been protested in consequence, he must have borne all the consequences, and the plaintiffs could have said truly, we have done all that was incumbent upon us to enable you to meet your engagement. If the bill had been lost, the loss, for all that we can see, must have been the defendant's. And though we have said it might seem equitable that the plaintiffs should bear this loss, yet knowing only what is known to us of the case, we cannot say that equity is with the defendant.

The plaintiffs gave full value for the two bills. The sterling bill produced the money, which was lost from the unforeseen and unusual circumstance of its being drawn before it was due, and placed in custody where it need not and should not have been. If, in fact, the bill on Wilson &



Co. was given to the defendant as agent to the plaintiffs, merely to send home and receive the money, then the defendant should not have sold it before it came to maturity. By discounting it through his agent, he seems to have made it his own.—(Giles et al. v. Perkins et al., 9 East 12).

Then the difficulty, besides, is really owing to the defendant, or rather his agent, desiring to pay his own bills before they came to maturity, which is not a natural consequence arising from the transaction he entered into with the defendant.

The defendant's case might be supported in two possible views of it. 1st. If we could say that the evidence shewed him to be merely acting for the plaintiffs as their agent in the whole matter, on the understanding that he was to incur no pecuniary responsibility, even if he or his sub-agent deviated from the usual course of business—or, 2ndly, if the plaintiffs, after the loss was known, shewed, by their conduct or admissions, that they acquiesced in the loss falling upon them; though this indeed resolves itself into the first, since it would merely supply proof that such had been the understanding.

But we have no authority to hold that W. Billings was the agent of any one but the defendant, even if the defendant were in this matter agent of the plaintiffs. An inferior agent's accountability is to his immediate employer and not to the principal; and if the loss occurred from W. Billings deviating from the usual course of business, the defendant would be liable, on general principles, for that loss.

If the plaintiffs had simply engaged that they would have the money in England by the day to meet the defendant's bills on his brother, and had accordingly placed the money in his hands, and he had lost or spent it, it would be absurd to say that the plaintiffs must pay the money a second time. The sum of the matter is, that the defendant lent the plaintiffs £1000 here, to be repaid in England, and it was repaid in England sooner than was necessary, to suit the purpose of the defendant's agent, and after its receipt the money was lost.



If we could say with propriety that the plaintiffs sent this £1000 bill to England, through the defendant, to answer the other two bills, then, if W. Billings, acting for the defendant, had refused to accept the bills, and the plaintiffs had afterwards taken them up, they could have reclaimed the £1000 bill, as their bill sent for a purpose for which it was not used. There are many cases arising from bankruptcy in which the question has occurred, whether a bill sent to the bankrupt for a particular purpose formed part of his effects, at the time of his bankruptcy, or remained the property of the person for whom it was sent; and much that is said in these cases is in its spirit applicable here. We refer to a case of *Tooke v. Hollingworth* (5 T. R. 215). See also 1 East 552; 2 Bla. 1154; 1 Atk. 233; 5 T. R. 494.

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#### BANK OF UPPER CANADA V. COVERT ET AL.

*Principal and surety—Change of office for which security is given—Surety no longer responsible.*

A surety by bond for the due performance of the office of bank agent is not responsible for losses occurring after the nature of the agency has been changed, and the agent appointed a cashier.

The defendants were sued as sureties for James Gray Bethune, upon their bond, dated 21st August, 1830, in the penalty of £2,000, with the following condition:—“Whereas James Gray Bethune hath been appointed agent of the Bank of Upper Canada at Cobourg, in the said district of Newcastle, and hath been required by the president and directors thereof to give good and sufficient security for the due performance of his duty. Now the condition of the above written obligation is such, that if the said James Gray Bethune shall and do faithfully and diligently, to the best of his skill and understanding, demean himself as agent of the said Bank, and shall and do, as often as he shall be thereunto required by the president and directors thereof, render a true, just, and full account of all the bills, notes, monies, and other things committed to his charge, as such agent as aforesaid; together with all interest and profits arising thereupon, and paid to him by such person or persons as shall from time to time transact business with him, as agent for the said



Bank ; and shall in all things obey and observe the instructions which shall from time to time be transmitted to him by the President and Directors of the said Bank of Upper Canada, touching or concerning the business by them confided to his charge, then this obligation shall be void ; otherwise, remain in full force and virtue."

Breach : non-performance of condition, &c.

At the trial, before *Robinson, C.J.*, the following facts were proved :—

Up to September the 12th, 1832, Mr. Bethune had conducted what is called an agency office of the Bank of Upper Canada at Cobourg ; and on the 28th of June in that year, the cashier of the Bank at Toronto wrote to him for the purpose, as he expressed it, "of ascertaining as early as possible his opinion respecting a proposed *change in his agency* ; telling him that it was probable a regular office would be established at Cobourg, and that he would be offered a salary of £300 per annum, in lieu of all charges for commission, &c.—that the office would be furnished by the Bank with books and stationery, and no doubt a vault and iron chests would be provided, the same as at Kingston and the other offices." "You will, I think, find your duty (he added) much easier and more satisfactory under this arrangement, than the present system ; besides, you will be able, by keeping a credit-book, to ascertain, at any moment, the state of every person's discount, the amount he owes the Bank, and who are his securities or indorsers. Besides, the office will only be open at stated hours—viz., from 10 to 3 o'clock, the same as at other places—which will save you much harassing business, which you now go through with at all hours of the day."

This letter Mr. Bethune answered on the 30th of June, saying that, on the same day (28th June), he had written to the president on the very subject which the cashier had suggested—and he adds, "I shall be satisfied with any allowance, in preference to the *present harassing* system."

On the 31st of July, the cashier wrote again to Mr. Bethune, acknowledging this letter from him, and also the receipt of the letter to the president, and said that they had both



been submitted to the Board. The Board had also, he said, been considering whether it would not be more advisable for Mr. Bethune, and for the Bank also, if they established at Cobourg a regular office, with the usual bank-books, &c., similar to that they have now opened at Hamilton—and suggested the advantages. “If, therefore,” he said, “you concur in this change, and are willing to undertake an establishment similar to the one alluded to, or to the other offices, the Bank will allow a salary of £300 per annum, on your finding an office and everything necessary, books and stationery excepted;” and he added that, whenever there should be stockholders competent and eligible, he might have a board, so as to discount notes within the district.

On the 10th of August, the cashier again wrote to Mr. Bethune, referring to a letter from him; and in this he said—“I observe that, owing to various circumstances, you will not be able to enter fully upon the duties of your office for some weeks yet, as you cannot at present spare Mr. Kitson to visit this place for the purpose of acquiring a knowledge of our books.” And, on the 13th of August, he again wrote to him—“As soon as you can make it convenient, it will be desirable that your office should go into operation.”

On the 25th of August, the cashier wrote to Mr. Bethune, stating that Mr. Kitson had arrived, and was making progress in learning their books—and expressing his expectation that there would be little difficulty in his acquiring the information, and that their method of keeping the discount-books would be found easy and correct on trial.

On the 8th of September, 1832, the cashier wrote to Mr. Bethune as follows:—“You will no doubt be prepared, next week, to open your office on the new system. I have to request that all notes received by you, either as renewal or new notes, may be drawn payable at your office, of which you will furnish, weekly, a separate discount-sheet for each: the one for renewals will be accompanied by your letter, stating the several instalments paid, and the sheet will be returned approved, and at the same time



the original notes to which they appertain will be charged in full against your office, and sent down; and this course will be followed up for the ensuing three months, *until the whole of the notes belonging to your late agency shall be gradually transferred over to your office, and each will be entered in your credit-book accordingly.* Your discount-sheet for new notes will be accompanied by your letter of remarks thereon, to be laid before the Board. I beg to inform you that your salary as cashier commences from the 1st instant, and will be payable quarterly, &c., on &c., at which periods you will charge the same against the Bank, in account, and transmit your receipts."

In November, the cashier sent him an iron chest for the use of his office; and on the 20th of December, 1832, he wrote to him—"You will charge your salary, from the 1st of September last, at £100, and place the balance of profits at credit of the Bank."

These letters were produced, on the part of the defendants, to show that after they became security for Mr. Bethune as Bank agent he received a new office or appointment as cashier—that to this office their security did not extend—and that they were not liable for any of his defaults in the capacity of cashier.

The cashier of the Bank of Upper Canada was examined as a witness at the trial, and was strictly questioned as to the nature of Mr. Bethune's duties while agent, and as to the change (if any) made in his situation and duties when he was appointed cashier of the bank at Cobourg. The general effect of the cashier's evidence was to represent the duties and liabilities of Mr. Bethune to be the same in both cases; that the business was not increased, as he thought, by the change made in September, 1832,—and that the only difference was, that the form of his account was altered, and that he received a stated salary instead of being remunerated, as before, by a commission, which yielded him about the same income; that neither situation was conferred otherwise than by a letter; that his responsibility was not increased, in regard to money or liability for incidental losses; that no board of directors had been



the present. The defendant demurred specially for the misjoinder, and had judgment on that ground; but it was not held or objected that the second count was bad *per se*, on the ground contended for here. The court did not intimate that if the plaintiffs, naming themselves executors, had sued on that bond alone, there would have been any objection to their recovering.

The present action is in the *detinet* only, when it ought rather to have been in the *debet* and *detinet*; but that is not now matter of substance.

With respect to matters of contract, it has been repeatedly decided that an executor or administrator may sue *as such*, as well as in his own name, upon a contract made with him in his representative character; and this not only in cases when the consideration flows from the deceased, but also when the consideration flows directly from himself, as executor.

Jenkins and wife, executrix, v. Plombe (6 Mod. 92, 181), recognizes this clearly: there the action was by husband and wife upon a contract with the wife as executrix, and Lord Holt says expressly that what the executrix had done in that case amounted to a discharge of the first debtor, and made a contract between the defendant and the executor; wherefore, he says, "the plaintiff *needed not have named* himself executor, it being upon a *contract with himself*; but his saying that it was to his use as executor is *true*, and therefore no harm, but rather better, for it shews how the right came." And Lord Holt notices the legal consequences of his so declaring—namely, that he shall not thereby be exempt from costs, though the debt when recovered would be assets, as indeed it would if he had sued for it in his own right.

So in the case of Betts, executor, &c., v. Mitchell (10 Mod. 316), the action was on several promises made to the testator, and joined with these was a count on a promissory note made to the plaintiff *as executor*, and payable to him or his order. There it was objected, as in the case of executors of Hosier v. Lord Arundell, that such causes of action could *not be joined*, not that the count on the note



was bad in itself. The court agreed that the declaration was bad for the misjoinder; that the note being made to the plaintiff as executor, was only a description of his person; that it was as much a new contract *as if a bond had been given for the money*, and that the plaintiff *might have sued without naming* himself executor; but they do not intimate that he could not name himself executor in suing upon that note.

In *King et al., executors of Stevenson, v. Thom* (1 T.R. 487), the action was against the acceptor of a bill, indorsed to the plaintiffs, in their *right as surviving executors of Stevenson*. The defendant demurred—first, for misjoinder (for there were counts by the plaintiffs in their representative capacity); and, secondly, because in this count they declared as on a promise to them as executors, whereas the promise was made to them in their own right, and not as executors, which is the same objection taken here. The court considered the case extremely clear against the demurrer, and, without hearing the plaintiffs' counsel, gave judgment for them.

Ashhurst, J., said, "there is no doubt but that this action may be supported. It must be taken for granted that the indorser was indebted to the testator, and to the plaintiffs as executors, and so he might indorse to *the plaintiffs as such executors*. Then they held the bill as executors, and, upon the acceptors refusing to pay, they may declare upon the right in which they hold it. No case has been cited to shew that this cannot be supported; and the acceptor is not in a worse situation than he would have been if the plaintiffs had declared against him in their own right. They have only declared according *to the truth of the case*."

This is a clear authority against this demurrer; and in still later times the cases of *Webster et al., executors, v. Spencer* (3 B. & A., 360), and *Marshall et al., executors, v. Broadhurst* (1 Tyrw. 348), support the same principle. In the latter case the plaintiffs sued as executors for work and labor done by themselves in completing a building which their testator had engaged to erect for the defendant, and their action in that form was sustained.



The decisions as to the joinder causes of action in the case of executors have been contradictory; but the rule now seems to be well settled in all the courts, that where the money, when recovered, would be assets, then they may be joined—See *Cowell v. Watt* (6 East 405,) and executors of *Powley v. Newton* (6 Taunt. 453).

On the whole it is clear that the plaintiffs, taking this bond in their character as executors, might sue for it either in that character, or in their own right: that they have not brought their action improperly in stating their demand according to the truth, and that the plaintiffs are entitled to our judgment.

Judgment for the plaintiff on demurrer.

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DOE EX DEM. MORGAN V. SIMPSON.

*Title—Seisin.*

Possession from which seisin may be inferred must be an actual or visible possession, not merely by construction only.

In this action of ejectment, tried at Hallowell at the last assizes, the lessor of the plaintiff made title, under a conveyance from one Mary Sheriff, of the south half of lot 13, in the second concession of the military tract; but the title of Mary Sheriff was not shown, neither was it shewn that she was in actual possession of these premises at the time of making the conveyance. On the contrary, another person was then resident (and had been so for many years) upon the particular parcel of land sought to be recovered in this ejectment, claiming it as part of the adjoining lot 12. Between the possessions of this person and Mary Sheriff a highway intervened, which had been long in use; but, on the part of the lessor of the plaintiff it was contended that this highway was not in the proper line, and that the true boundaries of lot 12 not only extended beyond it, but embraced that piece of land on the other side of it of which the proprietor of lot 12 was in possession, and which formed the subject of contention in this action. Under these circumstances, it was argued that Mrs. Sheriff, being in



actual possession of lot 13, or at least the greater part of it, her possession equally extended to the piece of land in dispute, if it could be shewn that that was part of lot 13, since it was not necessary to constitute possession that a person should really occupy every portion of the lot.

The learned judge (Sherwood), however, was of opinion, at the trial, that the title of Mrs. Sheriff not being shewn, it was necessary to prove that she was in actual possession before her right to convey could be presumed; and for want of such proof the plaintiff was non-suited.

*McDonell* in this term moved to set aside that non-suit, but on cause shewn,

The Court discharged the rule, saying that the possession from which seisin may be inferred must be an actual visible possession, not by construction merely. Here, so far from there being ground for the inference that Mrs. Sheriff was seised of the piece of land in question, there was every apparent reason for presuming the contrary; for she was actually dispossessed, and the land was in the occupation of another.

Rule discharged.

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### SMITH V. BOOK.

*Partnership—Trover by one partner against another.*

One partner cannot maintain trover against another, for converting the partnership property.

In this case, tried before *Robinson*, C. J., at the last assizes for the District of Gore, the plaintiff sued in trover for the conversion of a steam engine, used in propelling a saw-mill in the possession of the defendant. The verdict was for the defendant, and the plaintiff moved for a new trial.

Upon the evidence it appeared that the steam-engine, for which this action of trover was brought, if it was not from the first the joint property of the plaintiff and the defendant, was for their mutual benefit framed and set in a building upon the defendant's premises, in order to propel the machinery of a saw-mill.



ROBINSON, C. J. delivered the judgment of the court.

We are of opinion that the verdict was properly rendered for the defendant in this case, and that the rule for a new trial must be discharged.

The evidence was strong to prove that the engine, while in the above situation, was the partnership property of the plaintiff and the defendant, and if so, of course trover will not lie for it, by one against the other. If it had been the exclusive property of the plaintiff, and had been wrongfully set in the building by the defendant, against the will or without the consent of the plaintiff, that would of course have been a conversion of the engine. But it is clear that this was not the fact; and, taking this case the most favorably for the plaintiff, we can only state it thus: the engine if bought and paid for exclusively by the plaintiff, was with his perfect assent, and on agreement between him and the defendant, framed and set in a mill on the defendant's premises, the work and materials employed in setting it being furnished mostly, if not altogether, by the defendant. The understanding was, that when the mill should be put in operation an account should be settled of the costs incurred by each, and that articles of co-partnership should be entered into between them, regulating the division of the future profits.

The plaintiff says that when the time came for entering into these articles, the defendant refused to do it, and would neither buy the plaintiff's share nor sell his own; and that he is thus left without remedy. Under these circumstances he has demanded of the defendant to deliver up the engine, or in other words, to pull down the erections by which it is supported in the mill, rendering them useless, and relies upon his refusal to do this as evidence of a conversion. It is plain that if a partnership had actually existed between them the remedy for any wrong the plaintiff has suffered must be of another kind; and if no partnership has yet been actually formed, then the injury, according to the plaintiff's shewing, is the refusal to enter into this co-partnership according to his agreement. It is for the plaintiff to consider whether, under the circumstances, he has not a



remedy for failure in performing the special contract (which contract it is admitted was never reduced to writing), or whether he may not, after what has happened, sue for the value of the engine, as for goods sold and delivered; but it is plain that the case is not one in which trover could be maintained.

Rule discharged.

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FIDO v. WOOD.

*Assault and battery—Plea of “son assault demesne”—Replication thereto.*

To a plea of *son assault demesne* to a declaration for assault and battery, a replication that the defendant committed a breach of the peace, and that the plaintiff, being a constable and having view thereof, arrested him, is a good answer.

The plaintiff sued in trespass.

1st count, for an assault and battery, with many aggravations, beating with a stick, breaking the plaintiff's thigh, tearing his clothes, &c.

2nd count for a common assault.

The defendant pleaded—1st, the general issue.

2ndly, to the first count *son assault demesne*.

3rdly, a plea, in which issue in fact is joined.

To the 2nd plea (in bar to the 1st count) the plaintiff replied that he was possessed of a shop in Stamford; that the defendant entered and made a great noise, disturbance and affray therein in breach of the peace, whereon the plaintiff requested him to cease and depart from the shop; that he refused and continued making the noise, disturbance and affray, whereupon the plaintiff, *being a constable* of the township of Stamford, in order to preserve the peace and restore tranquillity in his shop, seeing and having view of the breach of the peace, gently laid his hands on the plaintiff for the cause aforesaid, and, as constable, took the defendant into his custody, which was the said supposed assault, and that the defendant thereupon being irritated and enraged, assaulted the plaintiff, which is the same assault, &c.

The defendant demurred specially to this replication, and assigned for causes—1st, that there was no such office as



*constable for Stamford*; 2ndly, that the plaintiff does not shew that he took the defendant before a justice, or that the defendant was discharged from the arrest, or released by the plaintiff, or any person having authority so to do.

ROBINSON, C. J., delivered the judgment of the Court.

Of course this demurrer to the replication calls also into question the sufficiency of the defendant's plea of *son assault demesne* to a count complaining of so aggravated a battery—is it a good justification to the charge of breaking the thigh? It is held to be so, where either a wounding or a maim is charged—Com. Dig. "Pleader," 3. m. 15; *Cockroft v. Smith* (Salk. 642 Cro. Eliz., 268). The evidence may be such that the battery may appear of a kind too grievous to be justified by the first assault, if that be barred, in which case the defendant will fail upon the merits; but where excess is not replied, the defendant's allegation that if any hurt happened to the plaintiff it was occasioned by his first assault, is *primâ facie* a defence, since nothing more may have been done than the circumstances justified in the progress of the quarrel commenced by the plaintiff.

Then, as to the sufficiency of the replication demurred to, there is nothing in the cause first assigned, for there certainly is such an office as constable for a township. The constables are appointed for the several townships and not for the district at large, as the defendant seemed to suppose.

The 33 Geo. III., ch. 3, sec. 10, which regulates this matter, is not affected by the recent statute, 3 Wm. IV., ch. 8, in that particular, and the plaintiff is therefore regularly called constable of the township of Stamford.

As to the other cause assigned, we think it fails also. The plaintiff is merely justifying an alleged assault; he is not answering a charge of false imprisonment. If he shews a right to lay hand on the defendant he shews enough; he was not bound to take him before a justice. If he shews a right to restrain him for the moment from continuing the affray, that is enough. The plea is certainly informal and badly drawn, for it leaves it doubtful whether the plaintiff



means to justify his first assault upon the ground of legally defending his own possession, or of interfering as an individual to prevent the continuance of an affray, or of acting as a constable in preservation of the peace.

If it be exceptionable on the ground of duplicity, however, the defendant should have demurred for that cause; and if we see that there is in the plea, taking the whole statement into view, a legal justification for the assault, we must, "according to the very right of the case," give judgment for the plaintiff.

Now, we think the assault is justified on the facts stated by the plaintiff. An affray is admitted by the demurrer, and the plaintiff, as an individual present at the affray, had a right to lay hands on the defendant to restrain him; and he alleges that he did lay his hands on him and *took him into custody* in order to preserve the peace. This answers the assault. Its being the plaintiff's shop in which defendant was committing the affray is immaterial: it cannot prejudice his justification on this ground, though it might, if correctly pleaded, have afforded ground for a distinct defence of the assault in removing him after desiring him to go.

Then, regarding the plaintiff in his character of constable, enough is shewn to warrant him in interfering. An affray is stated to have been made by the defendant in his presence; that gave him, as constable, a right to lay hands on him to preserve the peace and prevent further violence, and this notwithstanding the disturbance occurred in his own shop. It is true he does not say that he took the defendant before a justice or to gaol; but that was not necessarily incumbent on him: he had a right to interfere and restrain him merely by taking him into custody, and this is what he says he did, and it includes the assault, which is all he is called on to account for.

The error in the replication is, that it leaves it uncertain whether the plaintiff means to justify as constable or as owner of the shop, or as an individual present at an affray, and so the defendant cannot tell certainly on what he intends to rest his defence; so that if, for instance, he could deny the fact of his being a constable, he might be told that



the stating his special character of constable was mere surplusage, and that the defendant relied on his right as an individual. This, however, is nothing more in reality than the fault of duplicity, which is only bad on special demurrer. The replication is sufficient in substance, if it contains a good justification of the assault.

In our opinion, therefore, the plaintiff is entitled to judgment.

Judgment for the plaintiff on the demurrer.

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### CORMACK V. BERGEN.

*Replevin—Distress for rent—Evidence.*

In replevin, under the plea of *non tenuit* to an avowry for rent in arrear, the plaintiff may show an eviction.

This was an action of replevin brought by Cormack, whose cattle were seized under a distress for rent.

The defendant was the landlord, at whose instance the distress was made, and he avows for rent due by Wrigglesworth and Jordan, his tenants, under a demise made by him, the defendant, at a yearly rent of £50, payable half yearly; one year's rent upon which demise, for the year ending 1st May, 1836, he avers to have been in arrear.

The plaintiff replied, "that Wrigglesworth and Jordan "did not hold or enjoy, as tenants to the defendant, under the said supposed demise in manner and form," &c.

Upon this issue the cause went to trial at the last assizes for the Home District. The demise proved was by deed, dated 10th March, 1834, for seven years, to commence from the 1st May, 1834.

At the trial it was proved that one of the lessees went into possession of the farm and cultivated it for six months, from May to November, 1834; when the plaintiff Cormack came forward and claimed the place as his, and forbade the tenants from paying to Bergen, the defendant, the rent then due. Cormack brought an ejectment against the tenant, who sent word to Bergen of the claim that had been made, and offered to surrender his lease, but Bergen declined to interfere. The tenant, in November, 1834, abandoned the place, but left the house locked and kept the key. Cormack went into possession and has continued to hold, and his



cattle were distrained by Bergen to satisfy the rent due by the tenants.

The plaintiff offered evidence at the trial to disprove Bergen's title—that is, his right to make the demise; but the learned Chief Justice rejected it as inadmissible on this issue, and directed a verdict for the plaintiff, in order that the damages might be ascertained, reserving leave to the defendant to *move that a verdict be entered in his favor*, if the court should be of opinion (as the learned judge was at the trial) that the defendant's right to distrain was supported on this issue, and that the evidence offered to disprove the defendant's title was properly rejected. If the court should think he had no right to distrain, then the verdict for the plaintiff was to stand.

The jury found for the plaintiff and one shilling damages, for in fact the damage was only nominal, the cattle never having been taken out of the plaintiff's possession.

ROBINSON, C. J.—The action seemed to be brought to try the title, which ought rather to have been made the subject of an ejectment.

The defendant has moved for a *new trial* on the ground of misdirection, instead of moving to enter a verdict in his favor on the point reserved, which he is clearly entitled to, if we should be of opinion that the right to distrain was supported upon the evidence given, and that the plaintiff was rightly precluded from disproving Bergen's title at the time of the demise, upon this issue of *non tenuit*.

The simple question is, whether eviction by a stranger having a paramount title, can be given in evidence under the common plea of *non tenuit*, which this is, or whether it must not be pleaded specially.

Unless such a defence is open in all cases on the plea of *non tenuit*, it ought not to have been admitted here, because nothing peculiar was either proved or offered to be proved, which might distinguish this case from others. It was merely asserted, on the one hand, that the plaintiff was prepared to prove that the property was his, and that the avowant had no right to make the demise; while, on the



other hand, the avowant declared himself ready to prove that the estate was his and not the plaintiff's, and that he had consequently good right to demise.

I thought the plaintiff could not be admitted upon this issue of *non tenuit* to disprove the avowant's right to demise; and, having rejected such evidence on his part, there could, of course, be no necessity, and would have been no propriety, in receiving evidence from the avowant in support of his title.

Though I directed a verdict for the plaintiff, it was declared to be only in order that the damages might be ascertained, in case the tenant should think hereafter that there was upon any ground a failure in proving the right to distrain: but I reserved leave for the defendant to move to enter a verdict in his favor, if the court should think the right to distrain made out in the first place, upon the evidence as it stood; and in the next place, that I was right in rejecting the evidence offered by the plaintiff to disprove the avowant's title at the time of the demise. My impression at the trial was in favor of the defendant, and I only recommended a verdict for the plaintiff conditionally, and for the reason I have stated.

If the defendant had moved upon the leave reserved to him, I am now of the opinion that a verdict ought to have been entered in his favor. He has chosen rather to move for a new trial, and I think a new trial should be granted to him without costs; being of opinion that the plaintiff, on the evidence given, was not entitled to recover, and that the evidence on his part, upon the question of title, was properly rejected.

Upon the first point, I believe, we are all of opinion that the avowant's right to distrain was supported upon the evidence given. The demise was proved: the term still subsisted, though the tenants had left the premises; and it appears not to be material that the defendant avows for rent for the period ending in May, 1836, when, in fact, he distrained for the half year's rent which was actually due in November, 1834; a variance, in that respect, is held not to be fatal.



This being so, I am clearly of opinion there should be a new trial, since the defendant has not chosen to avail himself of the leave reserved by consent to move for a verdict to be entered in his favor; and my brothers, I believe, are further of opinion that there should be a new trial at all events, on the ground that the evidence of title which was offered ought to have been received; for that the parties should have been allowed to shew *on this issue* who had the title at the time of the demise, in order to make out or disprove the defence of eviction, by a person having the paramount title.

In disposing of this rule therefore, there is no difference of opinion among us as to the result, for as I retain my opinion against the plaintiff's right to recover, I am in favor of a new trial, since the defendant has not moved to have a verdict entered in his favor.

But I am compelled to differ from my brothers on the question which must again come up on the further trial—namely, the right to receive evidence amounting to proof of *nil habuit* on the plea of *non tenuit*. I think such evidence was properly rejected on the trial, and ought, if offered on the future trial, to be in like manner rejected; for it seems to me to be inadmissible both in reason and authority.

The landlord's claim for rent is favored in law; and the tenant's defence against the claim, and *a fortiori* the defence set up by a stranger in behalf of the tenant, should be precise in its nature, and such as, according to the general principles and rules of pleading, he can understand and come prepared to resist.

The tenant cannot defend himself now by saying merely that the landlord had no right to demise to him. That defence, when the lease was by deed (as it is here), was never open to him by the common law; and now, since 11 Geo. II., ch. 19, he is equally precluded from urging it even when the demise has not been by deed.

He cannot say merely that he "*did not enjoy during that term,*" because that may have been his own fault; he may unnecessarily have abandoned the premises, or may have submitted to the tortious act of a stranger.



But he may plead that no rent is in arrear, or that no such demise was made, or that he did not *hold* under the demise for the time rent is claimed, or for any part of it.

Both of these defences are, in fact, included in the plea of *non tenuit*, which is the plea of the plaintiff here in bar to the avowry. He did *not hold* (he says) under the demise stated in the declaration.

The pleading such a defence gives the landlord plainly to understand, 1st, that he must shew the demise, and that was done here at the trial; 2dly, that he held the term under him by virtue of that demise, which would not have been the case if the landlord had never permitted him to take possession, or if the tenant had surrendered the lease, or the landlord had forfeited or alienated the reversion, or if the landlord's interest in the premises had by any means ceased during the term.

All these facts, therefore, the landlord must come prepared to disprove on the issue of *non tenuit*, and they are all facts of whose existence he cannot be conceived to be ignorant. Besides, they all disprove the tenure, for by them the tenant may truly say, "though I cannot deny your right to demise, still the relation of tenant did not exist at the time you allege it did."

But he need not come prepared to prove, on the issue of *non tenuit*, that the tenant *was never evicted*, because, 1st, eviction simply is not a defence; and 2dly, it is not reasonable to suppose that he has a knowledge how the land has been actually occupied during the demise, since it does not concern him.

But still, though eviction simply is no defence under all circumstances, yet it may constitute a defence under certain circumstances.

Thus, if the landlord enters and evicts his tenants, it suspends the rent, and may be pleaded in bar to the avowry.

If a stranger enters and evicts, it may or may not be a defence. If the eviction is by a trespasser and merely tortious, it is no defence.

If by a person having an older paramount title, it is a



defence. It suspends the rent, because rent springs from enjoyment, or, at least, from a right and a legal power to enjoy.

When there is eviction by a person having paramount title there is neither enjoyment, nor a right to enjoy; under which circumstances the rent is suspended: but this suspension of rent by eviction is a defence distinct from *non tenuit*, and must be pleaded.

*Non tenuit* merely is taken to admit the demise and right to demise; and though it is coupled here, as it may be, with a denial of the demise, that does not involve a denial of the right to demise; which right to demise cannot be questioned by a direct plea of *nil habuit in tenementis*, nor incidentally under a plea of *non tenuit*, but as a circumstance necessary and sufficient to make eviction a defence, or, rather, to make it work a legal suspension of the rent, which suspension of rent is a distinct defence, and must be specifically pleaded.

The tenant not being able to plead *nil habuit*, or give it in evidence under *non tenuit*, admits the right to make the demise, and the demise being made, a term is created, and that *tenancy* continues, and therefore is not disproved under plea of *non tenuit* by showing an eviction by a better title.

The tenancy does exist, being created, *de facto*, in favor of a person, who, taking the demise, cannot deny the right to demise, *in order to shew that he is not tenant*; but as rent grows from enjoyment, or right and legal power to enjoy, eviction, by a better title, works a suspension of the rent, and constitutes that defence being pleaded. On such a plea the tenant offers the evidence, not to disprove the tenancy, which he cannot do if he took a lease, but for the purpose of shewing that the landlord is not entitled to rent; because the tenant had no enjoyment and no power to enjoy, being evicted by one having right.

Before the 21 Hen. VIII, a stranger to the avowry, as this plaintiff is, could not disclaim or plead no rent in arrear, but must pray in aid of the tenant and then plead such pleas. Now, by that statute, he may plead the same pleas as the very tenant, but he is in no better case, and cannot



deny the landlord's title otherwise than the tenant could.—Com. Dig. "Replevin," 3 R. 16.

The statute 11 Geo. II., ch. 19, sec. 22, gives the general avowry without setting out title, as well where the plaintiff in replevin is a stranger, whose goods have been distrained in the premises, as when the tenant sues. It says, "the plaintiff in replevin, or *other tenant* of the premises" (that is, or *other person*, tenant of the premises); thereby allowing that the plaintiff in replevin, though not the tenant, may have the benefit of the act. This general avowry was to save the landlord the necessity of shewing his title, and it has been held as a consequence that the tenant cannot dispute it—that is, cannot dispute that the landlord had a right to demise (though he may shew his title expired): he cannot plead *nil habuit in tenementis*. Sullivan v. Stradling (2 Wils. 208), establishes that a third person, whose goods have been distrained (which is the case here), cannot plead *nil habuit &c.*, in bar to the avowry, and it would be strange if he could. The court reason that case upon the same principles as if the tenant had been plaintiff, and lay no stress on the plaintiff being a stranger to the avowry.

It appears to me to follow inevitably, that if the plaintiff in such a case cannot plead *nil habuit*, he cannot give it in evidence upon the plea of *non tenuit*. This seems necessarily to follow from the decision in Sullivan v. Stradling, and the principles on which it is grounded, and writers on evidence draw this conclusion. Starkie on evidence 973 (note) is express to the point. Also, 2 Phillips on evidence, 129.

The defence the plaintiff wished to urge in this case, under the plea of *non tenuit*, was the eviction of the tenant by himself (the plaintiff), having an elder title. That he could have pleaded eviction by a stranger having a paramount title there is no doubt, and I can see no reason why he might not plead eviction under the same circumstances by himself, for he would not be advancing his own tortious act.

But that he could not avail himself of this defence without pleading it specially is clear, I think, on all the



authorities, and it is in this point that I differ from some of my brothers. If this evidence could have been received at the trial, then I can only infer that all who have written on this subject are in a common error, for I have nowhere found an intimation of such an opinion; but wherever the point is touched upon, I find the contrary opinion either expressed or clearly to be implied. I refer to the following cases and authorities—*Doe v. Batten* (Cowp., 246); *Ca. Temp., Hard.*, 172; *Fort.*, 361; *Alchorne v. Gomme* (2 Bing. 54); *Selwyn's N. P.*, 1222, 3; *Hammond's N. P.*, 437, 8; *Roscoe on real actions*, 638, 9; *Wingfield v. Seckford* (2 Leon., 10); *Com. Dig. "Pleader,"* 2 W. 50; 2 *Phillip's W.* 143; *Chambers' Law of Landlord and Tenant*, 539, 591, 644-5; *Selwyn's N. P.* 522, (Covenant.)

The case of *Parry v. House* (*Holts' N. P.* 489) is directly in point; and the learned reporter's note appended to the case contains a comprehensive and clear statement of the law respecting this question. The case was precisely like the present in its facts. The action was by a person whose goods had been distrained (not by the tenant), and he wished to dispute the landlord's title on *nil habuit*. The court said he could not, and that if the property were his he should bring ejectment; and in his note the reporter says, "under *non tenuit* the tenant may shew that the landlord's title has determined; but a suspension of the rent by eviction or expulsion must be specially pleaded," (page 498).

In the case of *Forty v. Imber*, as reported in 2 *Smith* 550, Lord Ellenborough is stated to have said, "that the statute 11 Geo. II., ch. 19, sec. 22, has always been considered to have given a generality in the traverse, and to have put it on the same footing as an assumpsit for use and occupation, which is given by the same statute."

In the same case, as reported by Mr. East (6 *East* 434); no such observation is attributed to his Lordship, but no doubt some such remark must have fallen from him.

It is clear, however, that all he could have meant by it was that the exact *quantum* of rent, or the precise time of the occupation, is not of the substance of the issue, and that a variance in these respects between the record and



the evidence is no more fatal in the one case than in the other. His Lordship did not and could not mean to say, that, since the statute, *non tenuit* in replevin was like the general issue in *assumpsit* for use and occupation, under which any defence might be given in evidence. That would have been certainly incorrect.

Though our opinions differ, it may be of service to the parties that they should be aware of our present impressions, and the grounds on which they are formed. If the cause proceeds, we shall have a further opportunity of considering the question.

McLEAN, J.—On first looking into this case I was strongly inclined to think that the verdict for the plaintiff should be allowed to remain undisturbed; but, on more mature consideration and an attentive examination of the principal cases which bear upon the points in issue, I am obliged to change that opinion. It is, I believe, generally admitted, that a tenant is not allowed to dispute *his landlord's right to demise*; and in the cases which shew that the *right* to claim *rent* has expired, that doctrine is fully recognized. A tenant may shew that since the demise any circumstances have occurred which destroy the relation of landlord and tenant, and that thereby he is discharged from the payment of rent.

In the case of *Hopcroft v. Keys* (9 Bing. 613), this principle is fully established, while the Chief Justice (Tindal) and the other judges seem anxious that it should not be understood from their decision in that case that they recognized the right of a tenant to dispute his landlord's authority to demise.

It appears to me that, in this case, the plaintiff could not give in evidence anything which the tenants, Rigglesworth and Jordan, could not have given in evidence. His plea is, that *they* did not *hold* under Bergen, the avowant, in manner and form set forth by him. Upon this plea the lease produced by the defendant is conclusive evidence as to the holding, and the question as to the *right to demise* could not have arisen between the original parties. If proof had



been offered to shew that *since* the demise the title of Bergen had expired, and that the tenants or Cormack the plaintiff held under some other person, this case would be analogous to that of *Hopcroft v. Keys*—but here the proof offered was to shew that Bergen had no right to the premises at *the time* of the demise. The plea of *non tenuit* puts in issue nothing but the *holding under* the defendant. If it had been intended to dispute the right to demise, eviction should have been pleaded and the paramount title set out, and then the defendant would have been aware of the necessity of supporting his claim, and the title would have been decided. But on the issue of *non tenuit* he had no reason to suppose that the plaintiff intended to dispute any thing but the holding under him of the original tenants.

It is laid down in Chambers' Law of Landlord and Tenant, on the authority of the case of *Hunt v. Cope* (Cowp. 242), that, "suspension of rent by eviction or expulsion must be specially pleaded." In this case the eviction of the tenants Rigglesworth and Jordan by Cormack would, under a superior title, operate, I think, as a *suspension* of the rent, and so ought to have been pleaded if it was intended to be relied upon. Bergen was not bound to sustain the possession of his tenants, and if they chose to leave the premises and to let in a person claiming under what they might conceive a paramount title, they did so at their own risk and upon their own responsibility, and their liability to pay rent would depend upon the validity of the title of the person so let into possession.

My opinion is, that the right of Bergen to distrain was maintained on this issue, and that he ought to have had a verdict entered in his favor.

Rule absolute for new trial.

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BARKER V. TABOR.

*Trover—Prochein Ami—Waiver.*

In an action of *trover* in which the plaintiff sued by his mother as his next friend, the court held that the latter, by allowing herself to be made guardian for bringing this suit, did not waive any right she might have had to the goods sued for, and that the consent of the mother to become *prochein ami* was no legal estoppel on her.

The plaintiff in this case sued for the conversion of two



young horses, which he claimed as his, upon the following facts: they had belonged to his reputed father (the plaintiff being illegitimate), and at his death they remained on the farm. The plaintiff's mother and the rest of the children, of whom this plaintiff was the eldest, also remained there.

No will of the father was produced, but it seemed to be admitted that, under some will which he had made the defendant had acted as his executor, and had assumed the control over this and other property of the deceased, and had left these colts on the place, whether to be used or disposed of by the mother, as the natural guardian of the infant family, or by the plaintiff, who was an infant nineteen years of age, and who sued by his mother as his next friend, did not appear clear on the evidence.

ROBINSON, C. J., delivered the judgment of the court.

I considered, after the case was gone through, that I could not tell the jury that the plaintiff had shewn a right of property in these horses; they had belonged to the deceased Barker. It was not shewn that he had parted with them, nor that he made any disposition of them by will. Under such circumstances this boy could have no legal property in them by succession; and I was proceeding to tell the jury that I thought they could not safely allow the plaintiff to recover, when the plaintiff's counsel urged that they must either belong to the plaintiff or his mother, and that the latter, allowing herself to be made his guardian for bringing this suit, had thereby waived in his favor any claim she might have had. It did not appear to me that I could, on any legal principle, recommend a verdict for the plaintiff, and I was proceeding to advise a verdict for the defendant, when the plaintiff's counsel voluntarily accepted a nonsuit.

I agreed that it should be set aside on his motion, if upon the legal ground last mentioned I thought to have ruled in his favor.

The plaintiff has now moved to be relieved against this nonsuit. I agree with my brothers, that, having become nonsuit at his own desire, he cannot now be received to move against the nonsuit, upon the general merits of the case.



If I was wrong upon the legal ground taken by him, it would be right that he should be relieved, but I am still of the opinion that (supposing even that the right of property must reside in the mother or in the plaintiff, as the plaintiff contends), the consent of the mother to become *procchein ami* in this action, is no legal estoppel on her. We cannot presume that a *procchein ami* knows precisely for what the infant is suing, or the ground of his claim.

We are of opinion the nonsuit should stand.

Rule discharged.

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STEVENS V. COWAN AND OTHERS.

*Trespass—Justification.*

Trespass *quare clausum fregit*, with a count for taking goods.

The defendants justified as commissioners and bailiff of the Court of Requests, and the plaintiff replied that he was not duly summoned to attend at the court at which judgment was recovered.

*Held*: Replication bad on general demurrer.

The declaration was in trespass *quare clausum fregit*, with a count for taking goods.

Cowan and Shire (the second defendant) justified as commissioners of the Court of Requests, setting forth that one Lynch impleaded the plaintiff Stevens in their court and recovered, &c., and that they issued execution and delivered it to Humphrey (the other defendant) as bailiff, who entered and seized the cattle.

Humphrey justified as bailiff under the execution, not setting out any judgment.

The plaintiff to both these pleas replied that *he was not duly summoned* according to the form, tenor, and effect of the statute, and as of right he ought to have been, to attend the holding of the court, &c., at which *the judgment was recovered against him*. The defendant filed a general demurrer to these pleas.

ROBINSON, C. J., delivered the judgment of the court.

The replication, we think, is clearly bad. In the first place our statute 3 Wm. IV., ch. 1, sec. 20 and 29, allows the court to adjourn a case from one sitting to another; so that having heard the case at one court, after due service upon the defendant, they may give judgment at another court, which the defendant of course need not be again



summoned to attend. And all that the plaintiff avers in his replication is, that he was not duly summoned to attend at *the court at which judgment was recovered*; which does not necessarily imply any irregularity.

The defendants Cowan and Shire, in their plea, do state that Lynch *impleaded* Stevens, and that *both parties were duly heard and witnesses examined*.

The plaintiff Stevens having been heard, must have attended and submitted to the jurisdiction, and so waived any objection on the ground of not being duly summoned. Besides, it is not indispensable that the defendant should be actually summoned: he may agree to answer without that formality, or he may give judgment by confession in a case where no summons has issued. The act allows it.

And again, to give the commissioners a cognizance of the cause, it is not necessary that the defendant should have been actually summoned. If they have *proof* before them of the summons and service, they are authorised to make a decree. The plaintiff does not say that they had not proof of such service, but that *he was not summoned*, which might make them trespassers by the wrongful act of the bailiff, in swearing to a service that he had never made.

The commissioners are not necessarily trespassers in giving judgment against a man *not duly summoned*; he may not have been *duly* summoned, because the summons may have been given by mistake to a person grown—or served after the return—or left at a house not being his usual or last place of abode—or with a person not grown up—or because the debt claimed and costs were not marked in the summons—or the bailiff may have wilfully made an untrue affidavit of service; and the commissioners would not be trespassers, where all had appeared fair before them, because there was, in any of these respects, an error or a misfeasance in the bailiff.

Whether the defendant has been *duly summoned or not*, may be often a question for the decision of the commissioners, and their judicial determination of that question can never make them trespassers. Here the plaintiff, though he says he was not duly summoned, does not deny that he was



heard, and the defendant expressly avers that he was, which therefore he admits, as he has not denied it.

Where a court has jurisdiction over the subject matter, which was certainly the case here, no action lies against the judge on account of any irregular or erroneous execution of his authority.—*Ackerley v. Parkington et al.*, 3 M. & S. 411.

With respect to the other defendant, who acted merely as bailiff in levying on the execution, if the court had a *general jurisdiction over the subject matter*, and if he had an execution good on the face of it, he cannot be a trespasser. He requires no judgment even to support his defence.

Judgment for the defendant.

### COMMERCIAL BANK V. ALLAN ET AL.

#### *Computation on foreign bills.*

A foreign bill may be referred to the Master for the computation of the principal, interest, and costs, and ten per cent. damages under the provincial statute.

The court in this case expressed an opinion that it might be referred to the Master to ascertain principal, interest, and costs, and also *the damages* given by our provincial statute on a protested bill drawn on a foreign country. Seeing that the damages being fixed by the statute, nothing is required but to compute them.

### SKILLINGTON V. BABY.

Where the plaintiff had lost a trial by the defendant having pleaded in abatement, and the latter moved to be allowed to withdraw his plea in abatement and plead to the action, the court granted the application provided that the defendant could produce affidavits to shew that he had a meritorious defence.

The defendant had pleaded in abatement another action pending. The plaintiff replied that it had been discontinued, and averred the record. The defendant pleaded to this *nul tiel record*, but the plaintiff was entitled to judgment on this issue last term, a proper record of discontinuance being produced.

The fact was, that although the rule to discontinue had been taken out and the costs paid, the discontinuance had



not been entered of record at the time of *nul tiel record* being pleaded: and on this ground the defendant, seeing that the court would give judgment for the plaintiff, moved for leave to withdraw his plea of *nul tiel record* and to be allowed to plead to the action, and that the plaintiff should pay the costs of that pleading, on the ground that the record was not actually made up when *nul tiel record* was pleaded; and so the existence of the record of discontinuance was, in truth, rightly denied.

The plaintiff had, in this case, lost a trial by the defendant having pleaded in abatement, and the court required first to know from the defendant whether he could shew that he had a meritorious defence. He was allowed to file affidavits in Michaelmas term on this point.

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#### SHAVER V. SCOTT.

##### *Award—Repugnancy.*

An award that the defendant should pay the plaintiff a certain sum, including the costs of the reference, and afterwards directing that each party should pay half the same costs, is bad for repugnancy.

Award that the defendant shall pay the plaintiff £63 and costs of the action, and each party pay his costs of the reference.

In fact, of the sum awarded, £30 and upwards were costs of the reference (plaintiff's), so that if that stood the award would be repugnant.

*Per Cur.* The affidavits shewed a palpable fault in the award in directing that each party should pay his costs of the reference, after having awarded to the plaintiff all his costs of the reference, by including them in the £63 which the defendant is directed to pay. It is clear that of this more than thirty pounds consisted of costs of the reference, which the award determines is to be borne by each party: the award is, in this respect, repugnant, whatever may have been the intention; and it would be unjust to suffer it to be carried into effect. We might allow the verdict to be entered for the debt and costs of the action as found by the arbitrators, setting aside so much of the award as consisted of the costs of the reference; but we are not



bound to cure the defect by this summary interposition, and ought not to do so, unless we are satisfied with the proceedings of the arbitrators in other respects. On the whole facts disclosed in the affidavits, we think the more just course would be to set aside the award.

Rule absolute setting aside the award.

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GORDEN ET AL. V. FULLER.

*Evidence—Credits.*

A plaintiff is not bound by credits given by him in account on the mere statement of the defendant, but may reject such credits, unless the defendant can shew that they ought to be allowed.

In this case a verdict was rendered at the last assizes at Toronto for £6000 and upwards, upon evidence taken under a commission in England.

The plaintiff had sent an affidavit to this country, made by one Bentley, their managing clerk, in order to prove their demand, under 5 Geo. II., ch. 7; and the defendant, on his side, took out a commission to examine the same witness, upon numerous interrogatories.

Upon the trial, before *Robinson, C. J.*, when the evidence taken under the commission was read, it appeared that the defendant in 1828 had gone to India, as master of the ship *Fairlie*, of which the plaintiff and others were owners: that the plaintiffs as merchants had made advances to the defendant to a large amount, for which he alone, and not the ship owners, was responsible to them: that, upon his return from India, the plaintiffs, who were managing owners also of the ship, had attempted to effect a final settlement of the voyage account with the defendant; and for that purpose had, from time to time, given memoranda of the charges against him, and had taken from him accounts of credits, which he represented himself to be entitled to, in his account with the ship: that, before any final settlement was effected, the plaintiffs discovered that the defendant's statements of credits, which he claimed for disbursements made in India and on other accounts, were incorrect: that they thereupon remonstrated with him and required explanations; but, that instead of remaining in



England and clearing up this extensive transaction, in which much confidence had unavoidably been reposed in him during the prosecution of the voyage to India, he suddenly left England and came to America.

ROBINSON, C. J.—The plaintiffs in this action are seeking their remedy against the defendant evidently under great disadvantages, occasioned by his unexpected removal.

Under these circumstances, it remains to be considered to what sum the plaintiffs have established an apparent claim. The defendant resisted their demand, first, in the whole, upon the ground that he was himself a part owner of the ship, and as such a co-partner with the plaintiffs, and therefore not amenable to them in a civil action at law.

2ndly, He objected that the plaintiffs, having once given him certain large credits for disbursements alleged by him to have been made in England, they were bound by those credits, unless they could satisfactorily shew by evidence that they were not claimable by the defendant.

On the first ground it is clear, the defendant can urge no such defence. Whatever might be the consequence of his being a part owner of the ship while he was employed on the voyage, it appears on the evidence that the fact did not exist. He had merely contracted, by an unstamped agreement, to become the purchaser of two sixteenths, for which he was to pay two several sums of £500. He paid one sum, but failed to pay the other, in consequence of which no sale was ever made to him, and no shares transferred, and the £500 made was placed to his credit on his general account. Besides, if he had been part owner of the ship, he would nevertheless have been liable to be sued by the plaintiffs for any advances made by them as merchants to him as master, or in his private capacity.

With respect to the credits which the defendant says were given and could not be retracted at pleasure, it appears on the evidence, given in answer to his interrogatories, that the plaintiffs, assuming for the time his statements to be correct, and upon their mere faith in those statements, took



from his mouth, and entered in their books, or minutes of account between them, the amount of certain credits which he claimed for transactions, of which he alone, at the time, could be informed : that those statements of the defendant were afterwards found to be untrue : that he was acquainted with the detection of the error, and instead of staying to clear it up, left England and removed to this country. Under such circumstances, we consider it rests with the defendant to support his right to those credits.

The evidence is very voluminous. At the trial it did not appear to me that there was any one of the items of the plaintiffs' charges of which I could say either that it was wholly unsupported by evidence, or that it was disproved clearly by any testimony elicited by the defendant. With the consent of the parties, the jury took the written evidence and accounts with them, and returned a verdict for the whole amount claimed.

This verdict we are not inclined to disturb. Upon examining the mass of evidence more at leisure than it was possible to do at *Nisi Prius*, there are two items, which, although probably fair and just in themselves, do not stand supported by evidence, so that we can say they are legally proved. These are, first, a sum of £113 16s. 11d., charged as paid by plaintiffs in London, on account of the expenses incurred by the defendant in the course of disputes that had arisen between him and his crew ; and secondly, £35 6s. 6d. charged as paid for the plaintiffs at the Surrey Asylum ; making in all £149 3s. 5d.

It is not shewn in any manner that these payments were made by the request or authority of the defendant, or in consequence of any liability assumed by the plaintiffs on his account.

In such a transaction as this, where the witness declares, as he does here, that the whole account is due, including numerous items of which the remainder are particularly proved, we cannot say that the jury do not often, especially in a large mercantile dealing, accept imperfect evidence of individual charges where the general complexion of the case convinces them that everything is fair ; and we know



that where the jury do in such cases give liberal construction and effect to the evidence the court afterwards is disinclined to interfere with their verdict, from a knowledge of the difficulty which exists of proving every item in a large course of commercial dealing, where a mutual confidence at the time has probably occasioned a want of strict caution.

In a case circumstanced as this is, we are not willing (if the plaintiffs strenuously object) to insist upon their relinquishing these items, or submitting to a new trial, unless the defendant will distinctly declare on affidavit that the plaintiffs had no authority from him to make these payments on his account, and that this part of their demand is therefore unjust. We are willing that he should be permitted in a supplementary affidavit to do this; in which case it ought, we think, to be in the option of the plaintiffs to abandon those items and retain their verdict for the residue.

Judgment for the plaintiffs, except as to the items which they may abandon.

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#### DOE EX DEM. SPRINGSTED V. HOPKINS.

*Witness—Debtor, as a witness, proving his own deed void for usury.*

In an ejectment brought by a sheriff's vendee of lands, sold on an execution, against a purchaser from the debtor before execution, in which it was contended that the deed to the defendant was usurious;

*Held*, that the debtor was a competent witness to prove the usury.

This action of ejectment was brought for the recovery of a large tract of land in the township of Saltfleet. At the trial it was proved that one Peter Spawn, being seised in fee simple of this property, conveyed it, on the 7th February 1828, by deed of bargain and sale, to Charles Anderson, for a consideration expressed in the deed of £200, with a general warranty of title against himself and all persons claiming under him.

In 1829, Charles Anderson died, having devised these lands to Charles Anderson, his son, in fee; by whom they were conveyed to one Mills in 1832; and, in 1833, they were conveyed by Mills to Hopkins, the defendant in this action.

It was shewn that after Spawn had conveyed to Ander-



son, to wit, on the 14th December 1829, a judgment was entered against Spawn at the suit of Springsted and others, executors of Springsted, for £2000 and upwards. Upon this judgment a *fi. fa.* against lands was issued in April 1835, and a sale by the sheriff took place in June 1836, when the lands were bid off by the lessor of the plaintiff in this ejectment, Peter B. Springsted, one of the plaintiffs in that suit, for £75.

The sheriff of the District of Gore, on the 14th June 1836, made a deed to Springsted, in pursuance of the sale, conveying the land (383 acres, for the £75), "in as full and ample a manner as he the said sheriff may or can, or of right ought to grant, bargain and sell the same, by virtue of the said writ of *fieri facias*, but not more fully or otherwise."

Under this sheriff's deed the lessor of the plaintiff made title; and in laying his case before the jury nothing was disclosed of the conveyance made to Anderson, but merely the claim of title to Spawn, the judgment against him, and the execution and sheriff's deed. Spawn was called on the part of the lessor of the plaintiff to supply evidence of the contents of the deed to himself from one Jones, the original owner of the property, which deed had been lost.

He was objected to as an incompetent witness, but the learned Chief Justice held that he was admissible to give evidence in support of the title derived through himself, under the sheriff's deed. The evidence given by him for the lessor of the plaintiff became unimportant; because, in the progress of the cause, it was shewn that both parties made title under Spawn, and his seizin was admitted.

The defendant's case was then proved, shewing title under the conveyance from Spawn to Anderson, long anterior to the entry of the judgment against Spawn.

To rebut this case, the plaintiff attempted to prove that the deed to Anderson was given by Spawn in fulfilment of an usurious contract, under which Anderson was to receive ten per cent. for the sum of £125 lent by him: that this deed, on the face of it an absolute conveyance, was given to secure Anderson, who, in return, gave back a bond, obliging himself to reconvey, upon the payment, by a



certain time, of a sum considerably more than the sum lent, with legal interest.

To prove the usurious agreement the lessor of the plaintiff desired to call Spawn, the grantor on the deed alleged to be usurious. The learned judge rejected him as inadmissible for that purpose, under the impression that a vendor could not be received as a witness to defeat the title of his vendee, by proving usury or fraud in his own contract. The case went to the jury without his evidence; and after hearing the testimony of several other witnesses in regard to the alleged usury, they found a verdict for the defendant.

A new trial was moved for on the ground that the evidence of Peter Spawn ought to have been received for the purpose of proving that the deed from him to Anderson was made in pursuance of an usurious contract, and was therefore void.

ROBINSON, C. J.—If Spawn was, for that purpose, a competent witness, there ought to be a new trial; not because we have any knowledge that he could have proved usury (for it does not appear what evidence upon that point he would have it in his power to give), but because, if he were a competent witness to speak to the fact of usury, the lessor of the plaintiff was entitled to have his testimony received; and it might possibly have tended to establish that fact, which, upon the evidence of the other witnesses, was not made out to the satisfaction of the jury.

That Spawn was a competent witness to be examined in the cause there can be no doubt, for he was not a party to the suit, and not necessarily interested in the event, as bail are, for instance,—that is, he was not *primâ facie* to be a gainer or loser by the verdict. He might appear to have an interest when particular circumstances came to be disclosed, but there was nothing in the relation in which he stood to the parties, or to the action, to make him, evidently and necessarily, an incompetent witness.

When, therefore, he was first called for the lessor of the plaintiff to supply evidence of a fact in the chain of title to himself, under which title the lessor of the plaintiff claimed,



I could not reject him as an incompetent witness generally, and could not refuse to hear his evidence to the point for which he was called ; for that was merely allowing him to prove a fact in support of the title, which it was desired to trace through him. Nothing had been then opened to the court respecting the usury.

As soon as the defendant entered upon his case, it became evident that there was no necessity for Spawn's evidence upon the point to which the lessor of the plaintiff had examined him, since the defendant himself made title under a deed from Spawn, and therefore was constrained to admit his seizin.

Whether, therefore, Spawn had been rightly admitted as a witness in that stage of the cause, and for the purpose to which alone he was examined, remained no longer a question which there could be any object in discussion, and I only allude to it now, because the plaintiff's counsel has argued, that, in consequence of his having been admitted and sworn as a witness on that occasion, he became necessarily a witness competent to speak to all the facts relevant to the cause. But I believe the contrary of this position to be very clear. It is constantly seen in practice that a witness, though not generally inadmissible in the cause, cannot be admitted to give evidence of a particular description. Sometimes he may be a good witness for one of the parties, though not for the other, and may be allowed to state facts which make against his interest, though he would not be received to give evidence which had directly the opposite tendency. The investigation of facts at *Nisi Prius* present frequent occasions for the application of this rule.

In one of the cases cited in this argument, though for another purpose (*Bent v. Baker*, 3 T. R., 27), Buller J., alludes to this distinction, for he says, "the question is, whether this witness having subscribed this policy, has thereby rendered himself altogether *incompetent*; because, if he were competent to answer *any* questions, he ought not to have been rejected *generally*."

I thought Spawn was not altogether an incompetent wit-



ness, and therefore did not reject him generally. But when the defendant had made out his case of title under a conveyance from Spawn, long anterior to the judgment under which the estate had been sold at sheriff's sale, as being still the estate of Spawn; and when, in order to repel this apparently better title, the lessor of the plaintiff proposed to recall Spawn, in order to prove by him that the deed which he had given to Anderson was void for usury, in which he had been concerned as the borrower, I felt myself called upon to consider whether Spawn, though not generally an inadmissible witness as to all facts in the cause, was not inadmissible for this particular purpose, and that it is now the question before us.

Before the case of *Jordaine v. Lashbrook* (7 T. R., 601,) the weight of authority, and the maxims by which the courts acknowledged themselves to be governed, must have led, as I think, to the conclusion, that, independently of the objection on the precise ground of interest, Spawn ought not to be received as a witness to invalidate the title of his grantor by impeaching the deed which he himself had given, on the ground of usury.

When Lord Mansfield decided the leading case of *Abrahams qui tam v. Bunn* (4 Burr 2254), he does not seem to have consented to any such opinion, as that the borrower upon an usurious contract could be a competent witness in a civil action to invalidate the security given by himself by proving usury; but, on the contrary, he is careful to remark, "no contract or assurance appears here for usury, and if there was, the recovery of the penalty on this information would not affect the contract." And again—"Had the defendant produced a security, or proved the pledge to be remaining in his custody, it would have been a different consideration, whether the witness, who was the borrower of the money, could be examined to contradict this."

But the much discussed case of *Walton v. Shelley* (1 T. R. 296), gave occasion to Lord Mansfield to apply his judgment directly to this consideration, which, in the other case, did not apply; and the terms in which his opinion is there expressed are not such as to leave us in doubt, that in a case



like the present he would have held the witness to be decidedly inadmissible. He treats it as a well settled and reasonable principle of law, "that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed." He says there is *sound reason* for it, and "that it is of *consequence to mankind* that no person shall hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it."

He adopts from the civil law the maxim, "*nemo allegans suam turpitudinem est audiendus*," and clearly considers it applicable in disposing of the question before him; which was, whether the indorser of a promissory note could be received to prove that the consideration for the note was usurious: and he concludes his judgment by stating, that "the indorsee trusted to the name of the indorser, and that *he* knew of no objection to the notes; and yet this same person was afterwards called to say that they were given for an usurious and illegal consideration; therefore, on that ground, I am of opinion that he was an incompetent witness."

It is to be observed that in this case it does not seem that the indorser had any concern in the usury that he was called to prove, for he was not the payee in the note. The case before us in that circumstance is stronger, as well as in this further circumstance that the instrument which this witness was called to invalidate was his own solemn deed under seal, for which he had acknowledged a valuable consideration to have been received by him in full.

In *Abrahams v. Bunn*, the judgment delivered by Lord Mansfield, which, indirectly at least, seemed to recognise the principle that no man could be allowed by his evidence to invalidate an instrument signed by himself, was delivered as the unanimous judgment of the court, which at that time was composed of very eminent judges. And in *Walton v. Shelley*, when Lord Mansfield made that principle in emphatic terms the express and sole ground of his judgment, he was supported to the full extent by all the other judges.

Willes, J., declared, "the general rule is, that no man



shall be permitted to invalidate, by his own testimony, an instrument to which he is a party." And he adds, "there has been no case cited in which this rule has been impeached."

Ashhurst, J., considered that, as regarded his interest, the witness was unobjectionable; "but he is inadmissible," he says, "on another ground, that no man shall be permitted to invalidate *his own act*, and here he has been a party to the fraud by affixing his name to the notes and giving them a sanction; and having done that, he shall not be admitted upon any account to say that those notes were void."

Buller, J., than whom few judges indeed have been more eminent, says, "I have always understood it to be a settled principle, that no man shall be permitted to invalidate his own act."—"The ground of objection has always been, *that no man shall invalidate his own security.*"

In *Bent v. Baker* (3 T. R. 34), although the judgment of the court was given on the question whether a witness was incompetent from interest, yet some of the judges took occasion to remark upon the legal principle, that witnesses shall not be permitted to invalidate instruments which they themselves have signed; and those who did advert to it, viz., Lord Kenyon and Buller, J., are stated to have expressed opinions quite in unison with the doctrine in *Walton v. Shelley*, except that Mr. Justice Buller seems to have thought the principle must be confined to the case of negotiable instruments—and Lord Kenyon does not expressly carry it further.

But it was truly stated by the plaintiff's counsel in this case, that the authority of *Walton v. Shelley* is no longer to be relied upon, whatever confirmation it may appear to have received from decisions that preceded or followed it.

Lord Kenyon, in several cases at *Nisi Prius*, refused to conform to it, and so far as his opinion could prevail, it was disregarded before it was expressly reviewed and overruled in banc. in the case of *Jordaine v. Lashbrook* (7 T. R. 601). Indeed, Lord Kenyon disclaimed the language imputed to him in *Bent v. Baker*, expressing his concurrence in the principle of *Walton v. Shelley*. But other judges inclined



to adhere to that decision, and the point appeared to be regarded as unsettled until the case of *Jordaine v. Lashbrook* (7 T. R. 601), by which it must be admitted that the principle that a witness could not be received to invalidate an instrument signed by himself was rejected as unsound and untenable.

Mr. Justice Ashhurst, who had joined in the judgment in the case of *Walton v. Shelley*, retained the opinion he then expressed ; but Lord Kenyon, and Grose and Lawrence, judges, expressly denied the soundness of the doctrine advanced in that case : and this latter decision is considered to have established this principle, in the words used by Mr. Justice Lawrence, "that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath ; who have not been convicted of any infamous crime, and are not influenced by interest."

The maxim that "*nemo allegans suam turpitudinem est audiendus*," is repudiated, or recognized only as applying to cases of plaintiffs making demands *ex turpi causâ*. The Common Pleas have adopted this decision (4 Taunt. 468); and however singular it may seem that a modern decision of judges so eminent as those who determined the case of *Walton v. Shelley*, and founded upon a principle assumed to be so clear and reasonable that it had been universally received and never controverted, should be discovered to be wholly erroneous and unwarranted ; yet, undoubtedly, the case of *Jordaine v. Lashbrook*, is now the guide, and *Walton v. Shelley* can no longer be relied on ; and it is not to be denied that the opinions expressed in *Jordaine v. Lashbrook* are so comprehensive and unqualified in their terms, that nothing that is said in *Walton v. Shelley* can stand with them. Upon the reason of the thing, I cannot say that the principles vindicated by the judges in *Walton v. Shelley* are not more satisfactory to my mind, than the opposite doctrine which has prevailed against them. But if the question of the competency of the witness *Spawn* were before us upon this ground alone, I think it probable we should find ourselves compelled to say that the objection cannot be supported by authority.



It is, however, to be considered, that however broadly the principle is laid down in *Jordaine v. Lashbrook*, the case, apart from the general language used, decided no more than that a person through whose hands a bill of exchange had passed, and by whom it had been endorsed, might be received as a witness in an action between other parties to the bill, to state a fact which rendered the bill invalid for want of a stamp.

To make that case, in its legal effect, analogous to the present, we must suppose that a person who had assigned a note or bill by indorsement, receiving value for it, and afterwards becoming in any manner possessed of it—could treat his own endorsement as void on the ground of usury or other illegality, in which he had participated—could endorse the note to another, and then be received as a witness to support the action of such second indorsee, in prejudice of the first, by proving the usury, &c. I am not yet prepared to say that the law allows this, and my difficulty would be greater in determining that the grantor in a deed can be received as a witness to invalidate his own solemn act under seal, which is the point contended for here—that a vendor can destroy in this manner the title of his own vendee, by impeaching the deed made by himself. I should desire to find, if possible, some express authority for holding that the doctrine advanced in *Jordaine v. Lashbrook* should be so extensively applied. Hitherto I have met with no case that warrants it; but the whole scope and language of the judgment in *Jordaine v. Lashbrook* does certainly warrant the application of the principle to such an extent; and if the court meant otherwise, it must be allowed that they left no room for any other construction. Not being satisfied, however, on this point, I do not unnecessarily give a conclusive opinion upon it.

That Spawn could not be admitted as a witness to prove the usury seems to be quite clear, on the other ground on which the case was rested in argument—namely, his direct interest in establishing the preference of the title under the judgment—inasmuch as by doing so he would to a certain extent be paying his own debt with property which he had



actually sold before. On this point the case cited, of *Bland v. Arnesley and others* (2 T. R. 331), is expressly in point. The sheriff in his deed to the lessor of the plaintiff professes only to convey such interest as Spawn had. If the conveyance to Anderson (which was long prior) were valid, then nothing passed by that deed, and the whole of Spawn's debt under the execution would still be due. He had a direct interest, therefore, in proving it to be invalid, and thus availing himself of the value of the estate a second time; and by leading the jury to this conclusion, he subjected himself to no remedy at the suit of Anderson or his representatives, since they could bring no action to recover back the money paid in consideration of the deed.

I am, on this ground, of opinion that the evidence was rightly rejected, and that this rule for a new trial should be discharged.

McLEAN, J.—In deciding the motion now before the Court, it is not necessary to enquire how far Spawn was a competent witness to invalidate the deed given by himself, if it appears that from any cause he was disqualified from giving testimony in relation to that deed. It appears from the testimony, that Spawn must necessarily have been interested in defeating his first deed and sustaining the sheriff's sale and the title derived under it, inasmuch as by doing so he would, in fact, be paying up a certain portion of his debt to the estate of Springsted, while he could have nothing to apprehend from any action on the deed to Anderson. On the ground of interest, therefore, I think Spawn was an incompetent witness to support the title of the lessor of the plaintiff; and though he was rejected, and perhaps properly rejected for another cause, yet being an incompetent witness, I cannot see any sufficient reason for disturbing the verdict rendered in this cause on account of such rejection.

Rule discharged—*Jones, J.*, dissenting.



## McDONOUGH V. CAMPBELL.

*Attorney.*

The court will not grant an order to compel an attorney to pay to a complainant compensation for the latter's trouble and expense incurred in compelling the attorney to pay over monies collected by him for the complainant.

Motion for a rule upon Mr. Campbell to pay to Mary McDonough, such a sum as will be sufficient to compensate her for the trouble and expenses incurred by her in compelling Mr. Campbell to pay over certain monies collected by him for her, to be ascertained by the Master.

In September, 1836, the grand jury of Niagara, at the assizes, made a presentment to the judge, that Mary McDonough had been put to unnecessary expenses and vexatious delay by Mr. Campbell since 1831, by withholding monies which he received for her. "The grand jury think such conduct improper and requires investigation."

Mr. Campbell denied positively that he ever refused to settle with the complainant, or asserted that nothing was due to her, or threatened to arrest her. He affirmed that he did several times offer her money (did not say how much), and the settlement was only delayed because she claimed the whole amount recovered against Bell in the first suit, and would agree to no deduction.

The action alluded to at Niagara was tried before *Robinson, C. J.*, in 1832: the defendant had received money of Thomas McDonough, brother of the plaintiff, and had given him a note or notes for it. McDonough left the country and died, and the defendant agreed, on getting up his notes, that he would give his note to the plaintiff (as the sister—there was no other privity) for the amount. Accordingly he made a note, thus, "I promise to pay in &c. the sum of &c., for value received."

By mistake no payee was inserted, and the note was not payable to bearer. The learned Chief Justice held that parol evidence could not be received to supply this utter uncertainty, saying that there was no original consideration between these parties. The plaintiff was not administratrix of her brother, and the defendant could not transfer this



debt to a third person. It must remain due to the estate of Thomas McDonough. On his stating this view of the case to the jury, the plaintiff desired to be nonsuited.

*Per Cur.*—We have looked over the affidavits in this case, and find no ground upon which we could properly make such an order as is desired.

The motion is for a rule upon Mr. Campbell, an attorney of this court, to pay to Mary McDonough such a sum as will be sufficient to compensate her for the trouble and expenses incurred by her in compelling Mr. Campbell to pay over certain monies, collected by him for her, to be ascertained by the Master.

It has been shewn to us, that the case of this complainant has engaged the attention of a grand jury of the District of Niagara, whose presentment, delivered to the judge at the last assizes, has been brought before us. No doubt, in making that representation, the grand jury were prompted by a sense of duty, under the evidence they received, and their statement is entitled to every respect; but we must examine how far the complaints preferred against the attorney in this case are supported by the facts proved to us.

With respect to the allegations that he refused to come to any settlement with the complainant—that he asserted that nothing was due to her, but claimed a balance for which he threatened to arrest her; all these are directly repelled in the affidavits of Mr. Campbell, and so distinctly and circumstantially, that we cannot possibly act upon them as if they were true.

It appears to us, besides, upon this whole case, which has been before us in different shapes and for different purposes, on several occasions, that there is no ground for imputing to the attorney any want of diligence or attention in conducting the suit against Bell, the failure of which resulted entirely from the opinion of the court, upon one or more points of law arising in the case, which presented legal difficulties not in the power of the attorney to remove.

It is true, certainly, that between the amount of costs claimed by Mr. Campbell, and the amount allowed by



taxation, there was a vast difference, so that he was eventually obliged to pay to the complainant £49, instead of a small balance of £4 or £5, which he contended was all that was due.

The difference arose from a reduction made in the taxation upon several references which were made to the Master under the direction of this court some years ago, when the whole matter underwent a particular investigation. The costs of taxation on these occasions were ordered to be borne by the attorney: the balance found due was then paid, and the order made on that occasion having been fully complied with, the matter must rest there, so far as the summary interposition of this court is desired.

If in consequence of delay of payment, or any other negligence or default, the complainant has been injured, she must take the advice of her counsel, whether any remedy is open to her by action for such injury.

Order refused.

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### KINGSMILL ET AL. V. BROWN.

#### *Practice—Amendment.*

The plaintiff recovered a verdict at Nisi Prius, which was set aside in term. He then moved to amend his declaration by adding two new counts; and leave was granted on payment of the costs of the former pleading and of the application.

The plaintiffs in this case recovered a verdict in assumpsit, at the last assizes for the district of Newcastle, which was set aside by this court, in some measure from the inconclusive nature of the evidence, and upon doubts whether the plaintiffs could recover upon the declaration as it was framed.

The plaintiffs moved for leave to amend their declaration, by adding two new counts, not for the purpose of introducing any new cause of action, but to shape their demand in different ways so as to meet the nature of the case upon which they recovered at the trial.

The defendant objected that such an amendment could not be allowed after verdict, although that verdict had been set aside and the record was still open.

*Per Cur.*—There are doubtless cases in which it has been decided, that after two terms the party shall not be allowed



to amend his declaration, so as to introduce a new cause of action, because he is bound to declare upon whatever cause of action he has within two terms; but the reason of these decisions does not extend to cases where the plaintiffs merely desire to declare more perfectly upon the ground of action already advanced.

After trial of an issue upon *nul tiel record*, when the plaintiff has failed on account of a fatal variance, the courts have allowed him to amend his declaration so as to cure the objection, and new pleas have frequently been allowed to be added, after a verdict set aside, in order to let the party into his true defence.

We see no objection to the amendment asked for in this case. It must be on payment of costs, and the declaration must be served anew.

Rule absolute.

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EVERETT ET AL. V. HOWELL ET AL.

*Religious society—Trespass against a trustee who had ceased to be a member.*

Trespass was held to be maintainable by the trustees of a Methodist chapel against a person who was a trustee, but having ceased to be a member of the society could not hold the trust under the provisions of the deed which created it; and some of the plaintiffs, who were not the original trustees, but had been elected as their successors under the same provisions, were properly joined in the action.

Trespass for breaking and entering a Methodist chapel of the plaintiffs in West Flamboro', on the 1st April 1836, and making a noise and disturbance therein, and breaking a door and windows of the chapel, &c. Damages £100. The defendants pleaded the general issue.

The plaintiffs produced in evidence a deed dated the 24th June, 1822, by which one Morden conveyed an acre of ground (on which this chapel is built) to Cummings, Howell, Simons, Everett, and Freeman, and their successors in office for ever, *in trust*, that they should erect and build thereon a house, or place of worship, for the use of the members of the Methodist Episcopal Church in Upper Canada, according to the rules and discipline which from time to time might be agreed upon and adopted by the ministers and preachers of the said church, at their general conferences in the United States of America, or in the said



province of Upper Canada ; and in further trust, that they should at all times for ever thereafter permit such ministers and preachers belonging to the said church, as should from time to time be duly authorised by the general conferences of the ministers and preachers of the said Methodist Episcopal Church, or by the yearly conferences authorised by the said general conference, to preach, &c. therein ; and in further trust, that as often as any one or more of the trustees mentioned in the deed should die, or cease to be a member or members of the said church, according to the rules and discipline as aforesaid, then and in such case it should be the duty of the stationed minister or preacher (authorised as aforesaid) who should have the pastoral charge of the members of the said church to call a meeting of the remaining trustees, as soon as conveniently might be, and when so met the said minister or preacher should proceed to nominate one or more persons to fill the place or places of him or them whose office or offices had been vacated as aforesaid—provided the person so nominated should have been one year a member of the said church immediately preceding his nomination, and be at least twenty-one years of age : and the trustees so assembled should proceed to elect, and by a majority of votes appoint the person so nominated to fill such vacancy, in order to keep up the number of five trustees for ever ; and in case of an equal number of votes, for and against the said nomination, the stationed minister or preacher should have the casting vote.

This deed was registered on the 7th of April, 1823.

It was proved that on Monday the 29th of February, 1836, a number of persons met at the chapel, determined to gain admittance for the expressed purpose of transacting some business therein. The sexton in charge of the building, being aware of their intention, went to oppose their entrance. The building was locked, and after some altercation, one or more of the windows was forced with an iron crowbar, the door also broken, and a number of persons gained admittance by this means. All the defendants, except Wilkinson, were proved to have taken part in this violent



act: against him there was no evidence, and he was acquitted. The others were found guilty, and a verdict for £20 damages given against them.

Two questions were made at the trial—first, as to the right of the plaintiffs on this record to recover damages for the alleged trespass, three of them, viz.: Hopkins, Griffin, and Coe, not being grantees in the deed—and secondly, as respects Howell, one of the defendants, it was objected that being one of the grantees in the trust deed from Morden, he was seised of the estate equally with Everett and Freeman, and equally entitled to bring this action, instead of being made responsible as a trespasser.

With respect to Howell, it was proved that twelve or thirteen years ago, and about a year after the trust deed was made, he ceased to be a member of the Methodist Episcopal Church. His retirement or rejection arose upon a point of discipline: he had become involved, it seemed, in a dispute with another member of the society, and the difference being referred to a committee of the church, they required that both parties should make an acknowledgment of their error. Howell declined for three years or more to comply with this injunction, and ceased in consequence to be a member of the society. He afterwards made the required acknowledgment and petitioned to be admitted again into the church—his expulsion having been strictly according to their discipline. He was re-admitted on his petition in 1833, and continued a member of the church till 1835, when he was again excluded in conformity to the rules of the society, upon a ground wholly distinct from the cause of his former expulsion, a neglect to comply with duties exacted from him in his station in the society. From that time (February 1835) he had not been a member of the society, and from the time of his first expulsion he had never acted as a trustee, or claimed to act or interfere in the trust.

ROBINSON, C. J.—With respect to the main objection—that is, to the right of these plaintiffs to sue—it was shewn that Simons, one of the grantees in the deed of trust, had



been dead some years : that Cummings was expelled and ceased to be a member before the death of Simons. Everett and Freeman, two of the grantees in the deed, having always continued to be members of the church, retain their character of trustees, and are therefore without doubt rightly made plaintiffs : the fifth trustee (the plaintiff in this action) was elected as the deed pointed out, to fill the vacancy assumed to have been created by the expulsion of Howell from the society, from which time, it is said, he ceased to be a member of the society, and, in consequence, ceased to be a trustee, according to the terms of the trust deed regulating the succession to the trust. The statute 9 Geo. IV. ch. 2, it will be remembered, gives effect to the provisions of such deeds so far as they affect the succession.

If any of these five plaintiffs were not in fact trustees (from any irregularity in the proceedings for keeping up the trust) then they are improperly made plaintiffs, and have no right to damages for the trespass complained of, at least so the defendants mean to contend ; and for that purpose evidence was gone into at the trial respecting the changes which have been made in the Methodist society since this trust was created, and probably it was intended to urge that, in consequence of those changes, no one can properly be held to be a trustee under this deed who adheres to the society since its relinquishment of episcopacy.

But, though I received this evidence in order that the whole case might be before us for future discussion, I did not consider at the trial that the plaintiffs' right to sue could be affected by it, because it was clearly proved that after the three new trustees were appointed, and while the five trustees (now plaintiffs) were acting in the trust, they appointed one Thomas Morden to be sexton of the church, gave him the key, and committed to him the care of the building ; that Howell, as well as the other members of the congregation, attended service in the church while it was in his charge, and, for all that appeared, had long acquiesced in the appointment and change of the trustees ; and that it was while the building was thus in the actual possession of this servant of the trustees that the defendants



who are convicted of this trespass came in a violent manner and broke down the door and windows.

I told the jury that, whatever might be the merits of the question as regarded the changes made in the society, if they were satisfied that these plaintiffs, being *de facto* trustees, acting as such, and recognised by the congregation generally, placed Morden in possession of the building as their servant, then his possession would be their possession; and that, so being in actual possession of the church, they had a right to maintain trespass for a violent injury done to the property by wrong-doers, independently of any questions that might be raised as to their legal interest.

The jury expressly found that the plaintiffs were in the actual possession of the property through Morden, their servant, and gave their verdict for the plaintiffs.

It is now moved to set aside this verdict as being against law and evidence. I see no ground on which we can disturb it; and it certainly should not be our inclination to interfere, unless the verdict were clearly against law, for the act was violent and indecent, a gross outrage against the public peace, and, in a moral point of view, not to be justified.

McLEAN, J.—For the purpose of sustaining this action, I think it sufficient that the plaintiffs were the acknowledged acting trustees of the body to which they belong, and as such in the actual possession of the church or building injured. The defendants can only be regarded as wrong doers; and if any doubt could exist as to Howell, from his having been a trustee, that doubt is removed, as I understand, by a *nolle prosequi* being entered as to him.

I can see no sufficient reason, under the circumstances, to disturb the verdict; and think, therefore, that the rule for a new trial must be discharged.

JONES, J.—I am of the same opinion with my brothers.

The plaintiffs, by their servant, were in quiet and peaceable possession of the premises, and could defend such possession, without reference to the title, against wrong



doers. The defendants committed this violent trespass without claiming the title, or setting up any in the pleading or in their defence.

The only one who appears at any time to have had any legal interest in the premises was Howell, and that interest had ceased by his expulsion from the society, which he had acquiesced in, and in consequence of which it does not appear that he subsequently acted as a trustee in the matter, or claimed any right to do so. The verdict cannot be disturbed.

**Rule discharged.**

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## QUEEN'S BENCH,

MICHAELMAS TERM, I VICTORIA.

## DOE EX DEM. TIFFANY V. MCEWAN.

*Estoppel—Conveyance in fee by nominee before patent—Conveyance after patent to another party.*

A nominee of the crown, before the issuing of letters patent, made a conveyance in fee to one person, after which the patent was issued to him, and he then conveyed to another, who again conveyed.

*Held:* That the patentee of the crown and his assigns, as privies in estate, were estopped by the first conveyance, and that the patent fed the estoppel and made it a vested interest, confirming the case of *Doe dem. Hennessy v. Myers*, 2 O. S. 424.

This was an action of ejectment, tried at the last assizes for the district of London. It was brought to recover possession of Lot No. 11, in the fourth concession of Delaware. The lessor of the plaintiff produced, first, a patent from the crown to William Hazelet, granting him the premises in question in fee, dated the 9th Nov. 1835. In this patent the land was declared to be granted to William Hazelet as the eldest son and heir at law of Joseph Hazelet, deceased: and, in a marginal note in the patent it was stated that Joseph Hazelet was the original nominee of the land, and the patent issued under a report of the Land Commission.

2dly. An indenture of bargain and sale, made on the 26th of March, 1825, from William Hazelet and Mary his wife to Tiffany, the lessor of the plaintiff; whereby Hazelet and his wife, for a consideration of £500 acknowledged to be paid, did grant, bargain, sell, release and confirm to Tiffany, his heirs and assigns, for ever, the premises in question, lot 11 in the 4th concession of Delaware; "which said lot," the indenture stated, "*was granted* by the crown to Joseph Hazelet, now deceased; and he the said William Hazelet being the eldest son and heir to him the said Joseph Hazelet. A more full description may be had of said lot by reference being made to the Surveyor General's books at York."



This deed contained covenants by Hazelet and his wife, that they were the true, lawful and rightful owners of lot 11, &c., and were lawfully and rightfully seised in their own right of a good, sure, perfect, absolute, and indefeasible estate of inheritance, in fee simple ; with covenants for quiet enjoyment and further assurance.

The defendant made title also under William Hazelet. It appeared that before the patent issued, viz., in January 1835, William Hazelet agreed to sell this land to one Montague, who paid him for it, and soon afterwards sold the land to McEwan, the defendant, for a valuable consideration. The patent was sued out at the instance of Montague, though it necessarily issued in William Hazelet's name, according to the course of proceeding in such cases, under our provincial statutes ; and in a few days after the patent was completed, viz., on the 14th of November 1835, William Hazelet executed a deed of bargain and sale of the land to the defendant for a consideration of £150, acknowledged to be paid.

This deed was registered in the county registry office on the 26th of March 1836, at 9 o'clock, A. M.

The deed from Hazelet to the lessor of the plaintiff was registered *on the same day*, at 11 o'clock, A. M.

It was proved by the subscribing witness to the first deed (to Tiffany) that it was executed in 1825, when it bore date, and that William Hazelet had received a yoke of oxen and some money in part payment of the consideration.

It was admitted on the trial that McEwan was a *bonâ fide* purchaser for good consideration : that he had heard that Tiffany made some claim to the land, but was not aware of his having taken a conveyance from Hazelet, and further that he searched the registry before he purchased.

It was proved also that Montague, before he took his deed, had heard of Tiffany's having bargained for the land with Hazelet, and was told that he had a deed recorded, but on searching the registry he found this to be not true.

ROBINSON, C. J.—Upon the whole evidence there appeared to be no good ground for looking upon either Tiffany or McEwan as acting otherwise than *bonâ fide* ; and it seemed



to me that both were in a situation to insist fairly upon their strict legal right, whatever it might be.

For all that appeared in evidence at the trial, the lot was in a state of nature, and had never been occupied, or in the actual possession of any person.

Upon the trial before me, at London, I instructed the jury that the priority of registry in this case would not give a preference to the defendant's conveyance, because the title was not, before this, a registered title: that the deed to Tiffany, although made by Hazelet before he had the legal estate, concluded him by estoppel, because he could not be admitted to say that he had no title when he executed the conveyance: that the patent afterwards issuing enured to confirm Tiffany's title, which would thenceforward stand on the same ground as if it had issued before Hazelet conveyed to him; and that the defendant, as the assignee of Hazelet, was estopped from setting up a title, under the patent to Hazelet, in opposition to his first deed.

The jury, under this direction, found for the defendant, and a new trial has been moved for, on the ground that the verdict is against law and evidence, and for misdirection.

The case turns upon a principle which may have a very extensive and important application in this province, where lands are in a constant course of grant by the crown, and have been so from the first settlement of the country. In one case, *Doe ex dem. Hennessy v. Meyers* (2 O. S. 424), this court have already decided the point after argument and deliberate consideration; and at *Nisi Prius* I adopted and acted on that decision: but the judgment of the court in that case was not unanimous, and, feeling the grave importance of the question, we have been disposed again to entertain it, so far as we properly may, unfettered by the previous decision; and at our desire this case has been a second time argued, in order that the former judgment might be reviewed by those of us who determined that case, with the assistance of one of the judges who has since been added to this court.

In *Doe ex dem. Hennessy v. Meyers* it was determined by a majority of the judges, that Abbott, the original nominee of the crown, having made a deed conveying certain lands



in fee to Hennessy before he had received his patent, was estopped from saying that he had then no right to convey; and, that when the patent afterwards issued to him, it confirmed and made valid the title of Hennessy, so that it must prevail against a conveyance made by Abbott to another person, McKenzie, after the patent issued; for that the assignee of Abbott was bound by the estoppel.

The facts of that case differed from those before us, in these particulars:—The deed from Abbott was not intended nor did it profess to be an indenture, and it contained no covenant. The deed in this case, by which it is contended Hazelet and his assignee are estopped, professes to be an indenture *inter parties*, though it is not actually *indented*, and it is executed by Hazelet and by Tiffany the grantee, and it contains covenants that the grantor was seised in fee and had right to convey.

Whatever doubts may have passed through the minds of the court in the case of Hennessy v. Meyers on account of the first conveyance not being an indenture, and containing no covenant that Abbott was seised in fee, these doubts have no application here. All that is important to this case is, that we should review the principles of that decision, so far as they are founded upon facts which are common to both the cases; and I shall therefore only say shortly that, as at present advised, I am still of opinion that the principle of estoppel did no less apply in the case of Hennessy v. Meyers, notwithstanding the conveyance was not expressed to be by indenture, and although there was no covenant.

That deed purported not merely to be a release, or quit claim of all the grantor's right, whatever it might be, but it purported to be an absolute conveyance in fee. The act of making such a deed is an assertion of a title. Had it been in the common language of a release, then a covenant that he was seised in fee might have been necessary to conclude him; because, otherwise, the deed would have imported no direct assertion of his right to convey the fee. But when he executed that deed, purporting expressly to convey an estate in fee, he was concluded from saying afterwards that he had no interest in the estate;



and the fact being that he really had no interest, and so nothing could pass by the deed, the grantee's estate commenced by the estoppel, and this estoppel ran with the land, into whose hands soever it passed. When afterwards the king's patent came out to Abbott, the estoppel was turned into an interest, and the estate from thenceforth was holden as if the patent had preceded the conveyance.

There is no part of this doctrine, in my opinion, which does not equally apply against the person executing this deed, as if it had been by indenture. It is equally an estoppel in evidence against him who executed the deed, and his privies in blood, or in estate.

The principle that estoppels must be mutual creates no difficulty in a case of this description, where neither party is a stranger to the deed.

But it is urged that the doctrine of estoppel could not be applied, as it is sought to be in this case, and as it has been in the case of *Hennessy v. Meyers*, on account of some distinction which arises from the fact that the title, which subsequently accrued to the party making the conveyance, is a title under letters patent.

After the opinion which I had occasion to express in *Doe ex dem. Hennessy v. Meyers*, I need not say more than that I have reconsidered that point which was expressly urged there, and I can see no ground for departing from the judgment which the court then came to. The general principle, I take it, is not denied, that where one by indenture conveys an estate to another, with a covenant that he is seised in fee, he is concluded, and also his privies in blood or in estate, from alleging that he was not seised, in contradiction of his deed.

The case before us, in its facts, goes the full length of this. Then, as it is within the principle in its general features, it only remains to be considered whether it does not come; by reason of some peculiarity, within any of the exceptions to the principle. There are several of such exceptions, and the question is, whether the subsequent issuing of letters patent to Hazelet brings the case within any of these exceptions, for I can see no other peculiarity in the case which can call in question the application of the general principle.



As to these exceptions:—1st, There shall be no estoppel when the truth appears by the same record, or deed: as if it had, in any part of this deed, been stated that the title was still in the crown, and that Hazelet had but the promise of a grant; that would have prevented the estoppel.

2dly, Where the allegation is uncertain, as in the late case decided in the King's Bench in England, 2 B. & Adol. 278, where it was recited that the grantor was equitably seised, and the covenant was that he was seised of an estate in law, *or equity*; there, although he did by the deed profess to grant, bargain, sell and release the estate, yet, as the assertion of this interest was not in absolute terms, but qualified, there was held to be no estoppel.

3rdly, If an interest passes by the deed, there shall be no estoppel: as if this deed could legally have passed an estate less than the fee, then there would have been no estoppel, since estoppel is only allowed in those cases where the deed can have no effect without it.

4thly, When there is an estoppel against an estoppel: as if Tiffany here were in any manner estopped from denying, that, at the time of the execution of Hazelet's deed, the king or some other person was seised of this estate.

5thly, If the truth be found by verdict: I refer to this, merely because it may be suggested that it should have been left to the jury to say according to the truth, there being no estoppel set up in pleading; but clearly in an ejectment the estoppel would be conclusive, and must be applied by the court.

In Com. Dig. "Estoppel" E. 10, it is laid down that where an estoppel binds the estate and converts *it to an interest*, as is the case here, the court will adjudge accordingly; as if A. leases land to B. for six years, in which he has nothing, and then purchases a lease of the same land for 21 years, and afterwards leases to C. for ten years, and all this is found by verdict, the court will adjudge the lease to B. good, though it was so only by conclusion.

I note only such exceptions as it can be of use to advert to; there are a few others, founded on special circum-



stances, which do not apply to this case; and, with respect to these exceptions noted, I cannot discover how the case is brought within any of them. On the whole face of Hazelet's deed he assumes to convey in fee, and covenants that he has a right to do so; he speaks of no less estate, and no hint of qualification, or uncertainty appears. On the contrary, he says the land was granted to his father by the crown; that his father is dead, and he is his eldest son and heir, thereby setting out a clear title. No interest passed by the deed, unless on the principle of estoppel; and, as to there being estoppel against estoppel, I see none here. The letters patent, which came out after Hazelet made his grant, are certainly matter of record, and Tiffany cannot deny their existence; but it is not inconsistent with this record to contend that the king was not seised, and that nothing passed by it. On the contrary, the issue of *non concessit* is frequently raised, in order to determine whether any estate in fact passed by the patent. "If a deed, release, &c. be enrolled upon record, the defendant may plead that nothing passed by the deed, or not seised at the time, &c., for these pleas are consistent with the record."—Com. Dig. "Estoppel" E. 3.

As to all but the party making the grant, a record, or deed recorded, is open to question as to its effect, which must depend upon the right existing at the time. It is matter of common experience here that a patent is held not to convey the estate which it purports to grant, by reason of a prior grant having been made to another, which shews the king not to have been seised at the time of the second grant: and, again, these letters patent can argue nothing more than that the king had the estate in 1835, when he made the grant, and not he was seised in 1825, when Hazelet's deed was made. He might, in the mean time, have acquired the estate by surrender, or forfeiture; and the king having a right to grant in 1835, is no estoppel against setting up a right in Hazelet in 1825, and so no estoppel against estoppel.

On the whole, I know no ground on which the application of the estoppel, in this case, can be denied. It may



appear hard in some cases, and, in one respect, impolitic. Estoppels, it is said, are odious, and are not to be extended. Clearly, we have no right to extend the doctrine further than authorities warrant and require, and we should not desire to do so : but, as to estoppels being odious because they exclude the operation of the truth, that must depend upon the nature of the case in which the estoppel is relied upon. When the estoppel suppresses the truth in prejudice of right and justice, then its effect is odious ; when it acts by simply estopping a man from a fraudulent denial—a counteracting of his own deed, it supports justice, and discourages immorality.

If Hazelet, after making the deed to Tiffany for a good consideration, had sued out his patent, and thereafter brought an action in his own name to eject Tiffany, relying simply on his own want of right when he executed the deed, no one would say it was an odious principle of law which prevented his acting a part so palpably dishonest ; but if *he* would be estopped, it follows that his assignee, as privy in estate, would equally be estopped.

Here, it is true, a consideration of hardship arises, because the second alienee may be an innocent purchaser for valuable consideration, and this the defendant was in this case ; but so also was Tiffany, the first purchaser, and where one must lose, there is no equity in displacing the first purchaser in point of time, in order to make way for the second. It is true that buying from a grantee of the crown in possession of the patent, and finding no record in the county registry of any anterior conveyance made by him, a purchaser has strong ground for believing himself safe, and must feel it a hard case to find himself defeated by a conveyance made by his grantor before he had himself a title. But the mere possession of the patent is always an unsafe criterion to trust to, as constant experience shews : and, with respect to the registry office, the same want of information there may have place, and may lead to the same consequences, when the first conveyance has been made *after* the patent issued, or *before* ; for, until the estate has become the subject of a registered title, the first con-



veyance, though not recorded, will take effect, whoever may have had the custody of the patent, and whatever may be the hardship to a subsequent innocent purchaser.

It has been urged here, as in the former case, that to admit an estate to be, in effect, acquired by purchase before any patent has issued, is repugnant to our statutes passed for determining the claims of the heirs, devisees and assignees of the original nominees of the crown. If we could discover such a repugnancy, we must then conclude that the Legislature intended to prevent the application of estoppel in such cases, and we should have a satisfactory ground for refusing to give it effect. But those acts are so far from indicating the sense of the Legislature that an interest in lands was not to be transferred, before the issuing of a patent, that the very object of them is to receive evidence of such assignment, and to give effect to them by decreeing a patent to the assignee, where the original nominee is dead or absent; and they, moreover, do expressly recognize and give effect to mortgages upon the estate, made before the patent issued, in the same manner as if they had been made after its completion.

Still, if, by giving effect in such cases to the doctrine of estoppel, the operation of these statutes would be obstructed, or defeated, if the one were irreconcilable with the other, we ought to pause before we allowed a principle that would clash with these express legislative provisions. But, on this occasion, as in the former case, I must say that I do not perceive that such inconveniences can follow.

The decree of the commissioners gives that person a right to the patent in whose favor they report, and that right cannot be defeated by applying the doctrine which we are discussing. This is plain; for if the commissioners had reported in this case that the patent should issue to any other person than Hazelet, this question would never have arisen; such patentee would have held the bond, and Tiffany's title would have wanted that confirmation which it has received in consequence of the patent going to the person who made the deed to him.

The statute would have had its effect, and there would



have been nothing to rest the principle of estoppel upon. I do not see, therefore, how there can be a clashing.

I am glad that this occasion has arisen for reconsidering this question. I believe there are few more important that have come before us for decision.

The impression, I am persuaded, has been very general that the first purchaser after the completion of the patent, must be safe against any previous assignment; and, if the giving effect to a transfer made before the patent, in prejudice of such first purchase under the patent, has a tendency to impair the confidence felt in the king's grant, and the respect which is universally entertained for that title, that would be a very undesirable consequence. But we cannot suffer such a consideration to weigh against authority and control our judgment. It forms, however, a strong ground for wishing that an early opportunity may be taken of subjecting the correctness of our opinion to the examination of a higher tribunal, and I hope that may be done.

Since the case of Doe ex dem. Hennessy v. Meyers was decided by us, the case of Right ex dem. Jeffreys et al. v. Bucknell et al. (2 B. & Adol. 278), has arisen in England, in which the Court of King's Bench had occasion to consider the doctrine of estoppel. The facts there were, that a person, having merely agreed to purchase an estate, died in possession of it, and his heir mortgaged it in fee to another by lease and release; and the heir, having afterwards acquired a legal title, made another mortgage of the same property to a third person; and the last mortgagee brought ejectment against the first. The application of the estoppel in favor of the first purchaser was resisted, and the court held that the second assignee was not estopped from setting up his title, and upon two grounds:—1st, Because it did not appear on the face of the first deed that the grantor held himself out as seised of the legal estate, but rather the contrary, for he recited that he was legally or equitably entitled, &c., and he only covenanted that he was seised of an estate legal or equitable. But it is the first principle of estoppel that a person shall not be concluded by his deed unless in that which he



alleges directly and unequivocally, and, when the truth appears by the same deed, there can be no estoppel.

2ndly, Because the deed was, in form and effect, a *release* by the reversioner to a person in possession, and it could but have the extent and effect of releasing such interest as the releasor had. A person releasing to him in possession all the estate he has does not involve an assertion that he is seised in fee; and his assignee is therefore not estopped from denying that he was at that time seised, nor from setting up a purchase of any interest that afterwards came to him.

This case, therefore, leaves the general doctrine as it is applied here unshaken; and is an authority in favor of the lessor of the plaintiff, because here the deed professes unequivocally to convey an absolute estate in law, and contains express covenants of seisin.

The only doubt can be whether the subsequent issuing of letters patent has the same, and no other, effect as the acquiring the estate from an individual by purchase would have had. I am aware of no ground upon which it can be said that it has not.

SHERWOOD, J.—With respect to the defendant's first objection, that the deed to the plaintiff is a deed poll, and therefore cannot create an estoppel: there were two persons mentioned in the deed as the grantees—namely, William Hazelet and Mary his wife; but notwithstanding the husband alone signed and sealed the instrument as grantor, and the lessor of the plaintiff as grantee, still I am of the opinion it is the deed of all those who actually executed it; and therefore, as regards the question whether it will operate as an indenture or a deed poll; it is the same as if all the parties had signed and sealed it. To determine this part of the case it will be necessary to consider the nature and legal effect of an indenture as well as a deed poll, and to ascertain their intrinsic difference. In Co. Lit. 35 *a*, a deed is defined in substance to be an instrument, written on parchment or paper, sealed and delivered, to prove the consent of the parties, whose deed it purports to be, to all



the things contained in the instrument. In 229 *a*, it is said that an "indenture is an agreement &c., between two or more persons, and is indented in the top or side, answerable to another that comprehendeth the self-same matter, &c. If a deed beginneth, *Haec Indentura*, &c., and in truth the parchment or paper is not indented, this is no indenture, because words cannot make it indented; but if the deed be actually indented and there be no words of indenture in the deed, yet it is an indenture in law, for it may be an indenture without words, but not by words without indenting." Mr. Cruise, in vol. 4 page 11, says, that a deed poll is not, strictly speaking, an agreement between *two* persons, but a declaration of some one particular person. It appears by the remarks of Sir Wm. Blackstone, in the 4th vol. of his Commentaries, page 296, and by the notes to Co. Lit. 229 *a*, in which the authority of Spelman and Madox is relied on, that deeds were executed in England during the time of the Saxons by the parties signing their names or affixing the sign of the cross, and that after the Norman conquest deeds were executed by sealing without signing. It also appears to have been customary when deeds were made between two parties, who were named in the instrument, to write two parts, one for each party, on the same piece of parchment, with some word or letter of the alphabet written between them, through which the parchment was afterwards cut in such a manner as to leave half of the word or letter on one part and half on the other, and each party kept one part. Such an instrument in writing was called a chirograph. When the two parts were, at any subsequent period, placed together, if they exactly completed the word or letters cut through, such completion afforded a presumption of the authenticity of the deed, which, joined to the evidence of the seals, completed the legal proof of the instrument. At length indenting at the top of the deed only came into use, as it now is, without cutting through any letters or words, and without in fact making two parts, but still the deed retains the formal language of a mutual contract, executed by both parties, and each of them is supposed, by the fiction implied in the



deed, to possess one part of it. The statute 29 Car. II, ch. 3, was passed after the time of Sir Edward Coke, and by that act it is necessary for the grantor to sign every deed by which an estate in lands is attempted to be conveyed. I therefore incline to think that since signing has become a requisite to the validity of a deed, and since the indenting of the instrument by cutting a waving line at the top, as now in use, cannot in the least degree tend to establish its genuineness, or to prove that a counterpart of it was in fact executed, it is no longer necessary to be done. The words of the deed as clearly distinguish its species and character in law without the act of indenting, as they do with it, and as this is all that the interests of the parties to the deed require, there seems to be no good reason at this day to insist upon the ceremony of cutting a waving line at the top or side of the deed before it can be allowed to operate in the manner the parties intended it should, by the express words which they have adopted. *Cessante ratione legis, cessat ipsa lex.*

As to the second objection: If it be no indenture in law, still it is a bargain and sale for a valuable consideration, and does not operate as an estoppel, independently of its recital and covenants.

The principle of an estoppel being created by the operative words of a conveyance, without reference to any recital or covenants which it may contain, originates in the relation between landlord and tenant as established by the common law; and all the cases in the books, grounded on such relation, concur to prove, that if a lessor by indenture has no estate in the land at the time of making the lease, but afterwards acquires it by purchase or descent, still it is a valid lease by estoppel, and the lessor will not be allowed to shew that he had no estate in the premises when the indenture of lease was executed; and if a man take a lease, by indenture, of his own land, of which he has an estate in fee, he cannot claim the fee during the continuance of the term, but is constrained to admit the lessor to be the owner, contrary to the truth of the case. The following reasons have been given in support of the decisions resting upon this principle:



“The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. It is a part of the very essence of the contract, under which he claims that the paramount ownership of the lessor should be acknowledged during the continuance of the lease, and possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating the contract by which he obtains and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation.”

I think a similar rule cannot be applied to a conveyance in fee by way of bargain and sale for a valuable consideration, because the agreement between the parties created by such a deed is essentially different in its nature from a lease. By a deed of bargain and sale the vendor sells and transfers his whole estate and interest in the land to the vendee, his heirs and assigns for ever; and consequently the vendee has no remainder or future right of possession, and no reciprocity of interest exists between the parties to such a conveyance. A deed of bargain and sale conveys no greater estate to the vendee than the vendor actually has at the time of the sale, and if he had no legal estate in the premises then, but afterwards acquires it, and sells and conveys it by deed of bargain and sale to a third person, without notice, I am not aware of any decision in a court of law or equity, or any principle in either, which would estop such a vendee from shewing the truth in support of his title. I think there are decided cases to prove that he may. The first case which I shall mention is *Goodtitle ex dem. Norris et al. v. Morgan et al.* (1 T. R. 755). There were two mortgages given by the same person, of the same premises, to two different creditors. The mortgagor had not the legal estate in him when he executed the first mortgage, but he had when he gave the second mortgage. The ejectment was brought by the second mortgagee, who, when he took his mortgage had no notice of the prior



mortgage. It was decided that the person having the legal estate in such circumstances must prevail. Ashhurst, J., said, "No man ought to be so absurd as to make a purchase without looking at the title deeds; if he is, he must take the consequence of his own negligence." Buller, J., said, "Here the defendants took mortgages without enquiring into the title deeds. The subsequent mortgagee is a purchaser without notice, and as he has taken the title deeds he has the better title."

Right ex dem. Jeffreys et al. v. Bucknel et al. (2 B. & Ad. 278), was decided on the same principle. A., having an equitable fee in certain lands, mortgaged the same to B. by deed of lease and release in fee. The release recited that A. was legally or equitably entitled to the premises conveyed, and the releasor covenanted that he was lawfully or equitably seised in his demesne of and in the premises, or otherwise entitled to the same. A. had not the legal estate at the time of the conveyance, but some time afterwards it was conveyed to him; he then sold and conveyed the estate for a valuable consideration to C. B. then brought an ejectment against C., who held under the subsequent conveyance. The Court of King's Bench held, first, that there being in the deed of lease and release to B. no precise and certain averment of any seisin in fee in A., but only a recital and covenant that he was legally or equitably entitled, he was not thereby estopped from setting up the legal estate acquired by him after the execution of the release. 2ndly, that the release did not of itself operate as an estoppel by the words "granted, bargained, sold, aliened, remised, and released," because the release passed nothing but what the releasor had at the time of the conveyance, and A. had not the legal estate in the premises then, and consequently did not pass it to B. 3rdly, that this case did not fall within the rule that a mortgagor cannot dispute the title of his mortgagee, because C. claimed, as a *bonâ fide* purchaser for a valuable consideration, without notice, a legal estate, which was not in A. at the time of the mortgage to B. This case in 2 B. & Ad. recognises the principle established in 1 T. R. 755, namely, that a



subsequent purchaser for a valuable consideration, without notice, is not estopped to shew that the vendor acquired the legal estate which he sold and conveyed by the second deed after the first deed was executed. I think the second purchaser, under such circumstances, has every right *in foro conscientiæ* to make such a defence; because the first purchaser either knew that the vendor had no legal title, and therefore took the deed at his own risk, or he neglected to examine the title altogether, and therefore ought to suffer the consequences of his own negligence.

There is also a case in 1 Ad. & E. 531, which appears to me to have a direct bearing on the question now under consideration; I allude to the case of Doe ex dem. Oliver v. Powell et al. On the trial of the ejectment, it appeared in evidence that the lessor of the plaintiff claimed under a sale of the premises made to him by the assignees of a bankrupt of the name of Pope, to whom they had been conveyed in 1818, before his bankruptcy, by the *Tredegar Wharf Company*. It also appeared that the defendant claimed the premises under a conveyance to himself, which was made by the same company six years after the first conveyance to Pope. The defendants offered evidence at the trial to prove that at the time of the conveyance to the first purchaser in 1818 there was an outstanding legal estate in a trustee for the company, and that the company therefore had no legal estate to convey to Pope in 1818, but that afterwards, in 1824, they acquired the legal estate and conveyed it to the defendants. The learned judge who presided at the trial refused to receive the evidence, on the ground that the defendants ought not to be allowed to impeach the title of the company, under whom they claimed the title which they wished to set up in opposition to that of the lessor of the plaintiff. The jury therefore found a verdict for the plaintiff; and, in the succeeding term, the court granted a rule *nisi* to shew cause why a new trial should not be had.

Upon the argument in banc. it was contended on the part of the plaintiff that the evidence offered by the defendants at the trial was altogether inadmissible, and



that the defendants were estopped to dispute the title of the company from whom they themselves claimed. On the part of the defendants it was insisted that they had a right to shew that the company held no legal estate in the premises in 1818, when they conveyed to the lessor of the plaintiff. It was at the same time admitted by the counsel for the defendants that the vendee can never be allowed to say the vendor had no title, either at the time the deed was executed, or subsequently; but he insisted that the vendee may shew that the vendor had no legal title before he executed the conveyance under which the vendee claims the estate. The court granted a new trial, and said the evidence offered by the defendants at the trial ought to have been received. They observed the outstanding term might have been called in between 1818 and 1824, so that the company might have had a good title at the latter period, and a bad one at the former. These cases go to prove that a deed of bargain and sale is essentially different in its nature and quality from a lease, because in a bargain and sale there must be an actual use created, as well as a seisin to support it; and, therefore, a person who cannot stand seised to a use cannot transfer lands by deed of bargain and sale. Now it is quite clear that a man who has no legal estate whatever in the land cannot stand seised of it to the use of another; and therefore no use could be executed by virtue of the Statute of Uses, 27 Hen. VIII. ch. 10, and no transfer of any estate would follow a conveyance by him. On the other hand, a lease, from its legal character and nature, may have the effect to convey an estate in land by way of estoppel, which the lessor had not at the time of making the lease, but which he acquired afterwards; and, according to technical phraseology, such a subsequent estate will feed the estoppel; or, in other words, such a lease conveys by conclusion an estate to the lessee, although the lessor have no estate when he made the lease, but acquired it afterwards. The conveyance by deed of feoffment, with livery of seisin, produces a similar legal effect. To make a good and valid feoffment nothing is wanting but bare possession; and a freehold, or fee simple, by disseisin of the legal owner, may



pass by it, although the feoffor, in fact, was neither the one nor the other when he executed the deed.—Poph. 39; Lit. Rep., 611, and Co. Lit. 330 *b*. The feoffment bars and precludes the feoffor from all future right and interest and all possibility of right, and estops him from saying, under the circumstances, that he had no estate at the time of the conveyance.—Shep. Touch. 204.

The third objection on the part of the defendant is, “that neither the recital nor covenants in the deed create an estoppel.”

There are certain established principles to be found in the decisions of courts of common law, as well as equity, which require to be well considered as regards recitals in deeds and other written instruments before a conclusive opinion can be correctly formed respecting any particular case. It is not every recital in a deed which amounts to an estoppel, but such only as clearly contains certain essential and material allegations relative to the particular object of enquiry. It is stated in Co. Lit. 352 *b*, that “every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by agreement or inference.” It is said in Hob. 130, that “an estoppel ought to be certain and affirmative.” In Cro. Eliz. 362, that “a recital in a deed shall not estop, unless it be of a particular fact.”

These rules of construction should be adhered to, in order to decide a question of this kind according to law, because they form a part of the common law, and as such are binding on the court. The recital in the deed from William Hazelet to the lessor of the plaintiff is in the following words: “which lot was granted by the Crown to Joseph Hazelet, now deceased, and he, the said William Hazelet, being the eldest son and heir to him the said Joseph Hazelet; a more full description may be had of said lot number eleven by reference being made to the Surveyor General’s books at York.”

In this recital William Hazelet does not allege that his father ever received a grant from the Crown of the lot “*in fee*,” he merely alleges the land was “*granted*” by the



Crown to Joseph Hazelet, who was then deceased. There is therefore no affirmation of a seisin in fee by his father, unless such affirmation be contained in the word "granted," and, in my opinion, it would be improper to infer so important a fact from so indefinite a term. The word "grant," in its legal signification, is as frequently and as properly applied to conveyances for life, or for years, as to conveyances in fee. It may be said, if the recital is construed in connexion with the *habendum* in the deed, it is reasonable to suppose William Hazelet intended to allege that his father was seised in fee. On the other hand, however, if the covenant for title which immediately follows the recital be read, it will then appear that he could not have inherited the estate in fee from his father, because he professes in the covenant to hold the estate with his wife. If the recital, therefore, be construed by the aid of other parts of the deed, you are left to guess at the grantor's meaning, and to balance probabilities between conflicting parts in the same instrument. Such a course, I think, is not sustained by authority. This recital does not appear to me to be certain to *any* intent; but, to constitute an estoppel, it should be certain to *every* intent, according to the doctrine established and acted upon in Westminster Hall, to which I have alluded.

I will now examine the covenant for title as stated in the deed. That covenant, in terms, is applicable both to William Hazelet and Mary his wife, but not to William Hazelet alone. This appears quite evident from the words of the covenant itself, which are the following: "And the said parties of the first part, their heirs and assigns, do covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they the said parties of the first part are the true, lawful and rightful owners of all and singular the said lot No. 11, and premises above mentioned, with the appurtenances, and every part and parcel thereof; and now are lawfully and rightfully seised in their own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple of and in the premises hereby granted, bargained and sold, without



any condition, limitation of use or uses, or any other matter or thing to alter, charge, change, encumber or defeat the same."

In the premises of the deed, William Hazelet and Mary his wife are stated to be parties of the first part, and Gideon Tiffany to be the party of the second part; and there can be no doubt it was originally intended that all of the three persons so named should execute the deed. Why the wife of Hazelet did not sign it does not appear by the evidence. The words of the covenant, however, remain as they were first written, and relate both to the husband and wife, under the description of the parties of the first part, and expressly allege that they were the owners in fee of the land in question at the time the deed was executed. There is nothing in the testimony given at the trial to shew when the husband and wife acquired the ownership of the land; although that fact appears to me to have an important bearing on this case. If they acquired the estate after marriage, they are not joint tenants, and the husband had no estate whatever in fee which he could convey by a deed executed by himself alone, as this one is. The husband and wife are considered in law but one person, and neither of them is seised of any particular part of an estate in fee which comes to them after the marriage. Unlike joint tenants, each of them is said to be seised *per tout*, and not *per my*, and the whole estate belongs to both and to each of them at the same time. The wife is the owner of the whole estate, and so is the husband; and the legal consequence of such a peculiar holding is, that neither the husband nor wife can alone convey any part of the estate during the continuance of the marriage. Co. Lit. 187 *u*; 2 Lev. 39; 2 W. Bl. 1211; 5 T. R. 654.

If it therefore be understood that they acquired the estate after marriage, the covenant cannot be an estoppel, because the truth would, in such case, appear in the covenant itself,—namely, that the husband had no estate in fee to convey, and, consequently, conveyed none.

Supposing they acquired a joint estate in the premises before marriage, they were of course joint tenants then, and



the subsequent marriage did not alter the character of the estate, but they would continue to be joint tenants after the marriage.—2 Cruise 511. In the latter view of the case, it must be conceded that the husband would have a legal right to sell and convey, by his own deed, the undivided moiety of the whole estate, but no more; and, admitting this to be the correct view of it, I think the covenant is no estoppel, because the premises, together with the granting or operative part of the deed, clearly prove that the husband and wife intended to make a joint conveyance of the whole estate; but the covenant, with equal certainty, proves that the husband had only a part of the estate, at most. It therefore appears by the deed itself that William Hazelet was not the owner of the whole lot, and had no right to convey it, by deed of bargain and sale, at the time the deed was executed.

I think the covenant cannot be properly construed to be an estoppel in any possible way, and the recital is altogether too vague and uncertain to be entitled to that character. The rules of construction adopted by courts of justice forbid the assistance of inference or argument to supply its defects, even if it were possible to do so, but I think it is not.

I have no doubt the doctrine of estoppel had its origin in the relation of landlord and tenant, and it appears to be somewhat reasonable when confined to that relation; but, when you attempt to extend it to the vendor and vendee of a real estate, its reasonableness altogether vanishes. While the tenant has the enjoyment and advantage of the use of the land, and remains undisturbed in his possession, he can have no good reason to dispute the title of his landlord. While he has the whole benefit of all he bargained for, he can have no just grounds of complaint, whether the landlord in point of fact be the owner or not. The situation of the vendee of an estate is essentially different. It is important for him to have the legal title. If that fail, he has not what he bargained for, and for which he paid his money. The bare possession and use of the land are but secondary objects with him; it is the title which gives him



the principal value of the estate, by enabling him to sell or exchange it with facility and advantage. It is all important for him to see that his vendor has a legal title when he executes the conveyance ; and it follows, as a natural consequence, that he should have the right to prove, in a court of justice, that his title was legal when he acquired it, and that his vendor had no legal right to convey it to a prior purchaser. He should always be allowed to shew the real state of the title which the vendor had when he sold the land. The cases which I have cited sustain this principle, and are founded on natural justice. If the purchaser has the folly to accept of a deed of conveyance containing recitals and covenants, which, according to the established rules of law, prevents him from shewing the truth of the case—or, in other words, estops him—that is his own fault, and he must abide the consequence.

I think the present defendant is not so circumstanced. No part of the deed, in my opinion, estops him from shewing the truth in support of what appears to me to be an honest claim. I am convinced, from the facts of the case, that the lessor of the plaintiff was well aware the patent from the crown had not been issued when he took the conveyance from Hazelet, and therefore he received a deed of an estate which he knew belonged to the king. On the other hand, the defendant found the king's patent with Hazelet, and made every reasonable enquiry to ascertain whether any prior conveyance had been executed, and heard of none. There was no one in possession of the land. It appears to me the defendant was a *bonâ fide* purchaser for a valuable consideration, without notice, and I think that the general policy of our law relative to vendors and purchasers is decidedly in his favour, and I therefore think the defendant is entitled to a new trial without costs.

MACAULAY, J.—I cannot distinguish this case from the principles assumed in *Doe ex dem. Hennessy v. Myers*. The recent decision reported in 2 B. & Ad. 278 evinces the inclination of the court to abridge, as much as possible, the odious application of estoppels against the justice of



cases; but, adopting the rule therein approved, and applying it to the facts of the case before us, it would rather support than weaken it in aid of the plaintiff. General expressions in recitals to deeds are thought lightly of—particular recitals are allowed to possess influence. Now here the conveyance is by *indenture inter partes*, under seal, in which the grantor expressly states that the lot was granted by the Crown to Joseph Hazelet deceased, he being the eldest son and heir, and that a more full description might be had at the Surveyor-General's office. The instruments afterwards contain unqualified covenants of seisin in fee, and for quiet enjoyment and further assurance.

Judgment for the plaintiff, *Sherwood J.* dissenting.

#### MITCHEL V. THOMPSON AND REX V. MCKREAVY ET AL.

*Forcible entry and detainer—Inquisition under 6 H. VIII. ch. 9.*

An inquisition for a forcible entry, taken under 6 H. VIII. ch. 9, must shew what estate the party expelled had in the premises; and if it do not the inquisition will be quashed, and the court will award restitution. The inquisition is also bad if it appear to the court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of forty shillings, or that the party complaining was sworn as a witness.

#### MITCHELL V. THOMPSON.

*Certiorari* to William Thompson, Esq., tested last of Easter, returnable in Michaelmas term, directing him to return the plaint tried before him against Lewis Evans, Alexander McKreavy and Peter Page, and other malefactors unknown, on the complaint of George Tayler, in a plea of forcible entry and detainer. Returned, 12th of June under the justice's seal, and annexed to the return were—

First—The original information of George Tayler, sworn on the 14th of February, 1837; that on the 13th of February Charles Mitchell with Col. Adamson, came to *his house* (not said on what lot), and that Mitchell by promises and threats endeavored to induce him to leave the premises; that he declined, and that Mitchell ordered up his team, and took complainant's oxen and sled, and took his furniture and family, and removed them to some distance, and •



left them in the street; that seven days previous, one Fergusson, Alexander McKreavy, Lewis Evans, and Peter Page, had been in the house of complainant, and refused to leave when ordered; that complainant seeing so many persons there, and that they were determined to put him out of the premises, left the place from fear, (did not say when), being apprehensive that they would do some injury.

Secondly—An inquisition, taken in the township of Toronto, on the 20th of February, by twelve jurors, finding that George Tayler, long since lawfully and peaceably was possessed of and in one messuage, with the appurtenances, in the township of Toronto, and his said possession so continued until Lewis Evans, Alexander McKreavy and Peter Page, all of &c., and other malefactors unknown, on the 13th day of February aforesaid, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter and him thereof dispossess and with strong hand expel, and him the said George Tayler so dispossessed and expelled from the said messuage, &c., from the 13th day of February until the taking of the inquisition, with like strong hand and armed power, did keep out, and do yet keep out, to the great disturbance of the peace, and against the statute, &c.; and then concluded thus:—"We, whose names are hereunto set, being the jurors aforesaid, do, upon the evidence now produced before us, find the inquisition aforesaid true." Signed and sealed by the twelve jurors and the magistrate.

Neither the information nor the inquisition said where the premises were.

The motion was to quash the conviction (the justice returned nothing more than above).

Affidavits were filed: —of Alexander Proudfoot, that the justice refused to delay till the defendant's witnesses could be sent for.

Of Lewis Evans, that Tayler on the 13th went willingly and no force was used.

Of Col. Adamson, denying any force.

Of John Fergusson, denying the force.

Of Alexander McKreavy, denying any force; that Tayler



went freely ; that he remained in possession as tenant under a written lease or agreement from Charles Mitchell, until Monday the 20th of February, when he was dispossessed by a constable and Mr. Thompson the justice, and a number of persons, under some order from the sheriff.

Of James Morgan, the foreman of the jury, who said that he was asked by the constable to sit as a jurymen in the case against Charles Mitchell ; that he stated he *was not a freeholder* ; that Mr. Capreol said that made no difference, on which he went, and was sworn foreman, *when a verdict was given against Charles Mitchell*. No mention was made of Charles Mitchell in the inquisition.

Another affidavit of James Morgan that he understood Charles Mitchell had not been notified to attend ; that the jury found a verdict against Mr. Mitchell (not the fact), and that Mr. Thompson gave authority to restore Tayler to possession ; that Tayler, Peter Thomas and J. Rams were examined as witnesses.

Of Peter Page, that he had no notice to attend, and did not attend, and was not aware of any proceedings being had.

Of Lewis Evans, to the same effect.

Of Alexander McKreavy, to the same effect.

Of Charles Mitchell ; that in July 1836, he put George Tayler in possession ; that he was to give or receive a fortnight's notice to quit, and that he had leave to crop the land on shares ; that the premises belonged to Mrs. Jones, to whom deponent was then agent, and whom he had since married ; that in two ejectments her title to the land was affirmed by juries, against one Capreol ; that hearing Tayler intended to put Capreol in possession, deponent, on the 11th of February, gave him a written notice to quit ; that on the 13th of February, Tayler gave up possession to the deponent, who put Alexander McKreavy in possession as tenant ; that on Sunday the 19th of February, he heard from one Fergusson that Mr. Thompson, the justice, told him that on the next day they were going to have a jury at Port Credit, to enquire of some matters respecting deponent ; that on Tuesday following deponent learned that



McKreavy had been dispossessed, and Tayler put in, who had since given possession to Capreol. Denied using any force.

An affidavit of Charles Cameron, the constable ; that on the 20th of February, he went *to the premises in the pleadings in this cause mentioned*, and informed Alexander McKreavy and others that on the 20th of February (same day) a jury would attend to enquire into the complaint of George Tayler against certain persons, for a forcible entry upon his premises (distant about one mile from the place of trial).

Of John Moule, that on the 3rd of February he served Tayler with an ejectment, at the suit of Capreol, and that, on the 6th of February, Tayler attorned to Capreol ; and the attornment was shewn at the foot of the declaration, whereby Tayler attorned tenant to Capreol for the premises set forth in the declaration, (none being described in the declaration.)

On the 20th day of February, Mr. Thompson made a writ to the sheriff, reciting the inquisition truly, and commanding him to restore Tayler to possession. (Not naming the premises).

The information and complaint was against Mitchell ; the inquisition was against Evans, McKreavy and Page, and other malefactors unknown. The *certiorari* was conformable to the inquisition.

The motion for *certiorari* was to return the record of inquisition for forcible entry, on the complaint of George Tayler, specifying no defendant by name.

The notice of motion for *certiorari* served on the justice was by Charles Mitchell, and was *specific* of motion for *certiorari* of all inquisitions and proceedings against *him* for forcible entry. The summons to the jurors mentioned no person by name as charged with the forcible entry.

The writ of restitution mentioned the three persons as found guilty by the inquisition of the forcible entry.

ROBINSON, C. J.—I think Tayler stood in that situation that he might complain of a forcible entry by Mitchell,



that is, he was not a servant, having bare custody (within sec. 32 of Hawkins B. 64); but a tenant from year to year, bound to go out on fourteen days' notice, and to whom that notice was not given.

I think the inquisition is properly before us, so that we have jurisdiction over it. The *certiorari* is to return the inquisition. Then it is Mitchell who moves to quash it. I do not see that a writ of re-restitution is moved for.

The person dispossessed by the restitution was McKreavy, tenant of Mitchell, and he only could be restored. But I think Mitchell has an interest in the proceeding that entitles him to move against the inquisition: his tenant might not choose to do it.

The inquisition follows closely the form in Burn's Justice. It is bad on authority of cases, for not saying what interest Tayler held. I see nothing else wrong on the face of it. In case of inquisition by a jury, I think the evidence need not be stated as in a conviction, nor that it was given in presence of the defendant, nor that the defendant was summoned. As to the merits of the transaction, we have no jurisdiction, I think, to try on affidavits what the jury have found on their oaths. If the defendants meant to traverse the force, they should have tendered a traverse in writing, and I apprehend, may yet do so, and then it will be tried here by a jury. But if the proceedings have been irregular, this court may quash the inquisition and restore the party dispossessed. I apprehend they have been irregular:

First, Because no notice was given to Mitchell, who was complained of.

Secondly, Nor to those found guilty, except McKreavy; wherefore they could not defend themselves, and could not supersede restitution by a *certiorari* or traverse, and had no chance to avoid losing their possession. They have not been heard; could not challenge the jury; and one seems to have been disqualified (the foreman). The justice held the inquisition off the premises (as he might), but the defendants were neither summoned nor notified of time or place, and he refused to wait till their evidence could be procured.



The complaint is the foundation of this proceeding, and this charged the forcible entry (by implication) on Charles Mitchell: he should have been summoned and heard before restitution; and his tenant cannot be dispossessed, because the jury find other persons guilty of a forcible entry, who have not been summoned.

This, in the whole complexion of the case, is a palpable contrivance by Tayler, in fraud of his landlord, to defeat the recovery in ejectment against Capreol and let him into possession. The attornment of tenant is taken apparently with knowledge of McKreavy, who knew all the facts.

#### REX V. M'KREAVY ET AL.

The facts of this case were the same as in the last, and the court was moved to set aside the inquisition there mentioned, finding the defendants guilty of forcible entry and detainer.

ROBINSON, C. J.—We have inspected the proceedings and considered the affidavits filed on both sides, and are all of opinion that the inquisition must be quashed, because it does not allege what estate the person expelled had in the premises. The statute 8 H. VI. ch. 9, was construed to authorise restitution only in cases where the person expelled was seised of an estate of inheritance. The statute 21 Jac. I. ch. 15, extends the remedy to a tenant for years, and, in the opinion of Lord Coke, this latter statute will apply to tenants for a term less than a year.

Whether the person expelled in this case was more properly to be regarded as the tenant, or the servant of Mitchell, upon the facts stated in the affidavits, it is not for us to inquire. The defect is, that he is stated in the inquisition to have been possessed merely; and it is not stated what interest he had, or that he had any. I observe that the inquisition in this respect follows the form given in Burns' Justice, but the incorrectness of that form has been noticed by authors treating on this subject, and there are many adjudged cases expressly determining that it is insufficient. In *Rex v. Wanhope* (Sayers 142), the court of Queen's Bench quashed an indictment for forcible entry,



because it did not appear what stake the person expelled had in the premises, and there are other cases to the same point—2 Keb. 709, 1 Sid. 102; 1 89, Salk. 260, Ld. Raym. 610, 3 Salk. 170, Popham 205, 11 Mod. 273, 12 Mod. 417.

It follows, when the inquisition is quashed, that the court, upon the prayer of the party dispossessed under the justice's writ, must award a writ of re-restitution to place him in possession.

In my opinion, there are other faults in this proceeding, which render it unfit that this inquisition should stand. The want of notice to the parties convicted, is, I think, a well founded objection, both in point of fact and in law. Of the three defendants convicted, it is not shewn that two, Page and Evans, had any notice whatever. It is plain, on the affidavit filed in support of this proceeding, that they had not; and as to McKreavy, all that is stated is, that he was told verbally, on the 20th of February, that on *that same day* a jury would attend to inquire into the complaint of George Tayler against certain persons, for a forcible entry upon his premises. It is not alleged that he had any notice, or that he was implicated in the complaint; and, in point of fact, the charge of forcible entry was made against Mitchell, though these three defendants were convicted; and neither Mitchell, nor the persons convicted, were summoned, or had notice of the proceeding, or opportunity to produce evidence or make any defence; and all the persons convicted by the jury swear that they were not aware of the proceeding until after the conviction.

It is true that the statute 8 H. VI. does not in terms require notice, but natural justice requires it; and the uniform course of criminal proceedings make it necessary, that, before a person shall be found criminal, he shall be called upon to make defence. In addition to this principle, the courts have recognised the propriety of a notice in this particular proceeding, on this other ground, that it would be wrong to put a person out of possession of his house or land upon a complaint of which he has no knowledge.

Upon this latter ground, Saville 68 pl. 141 is express; and



Serjeant Hawkins, B 2 ch. 64, sec. 60, says, "As the justice is bound to stay the award of restitution upon the defendant's tendering a traverse of the form, so it hath also been said that he ought not to make such an award in any case in the defendant's absence, without calling him to answer for himself; for it is implied, by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby without having first an opportunity of defending himself."

It need not appear in the inquisition (as it must in cases of conviction by a magistrate) that the defendant was summoned or had notice. The law is less jealous of a proceeding before a jury, and will presume all right until the contrary is shewn. But when we see that there was in fact no notice, we ought not to allow the inquisition to stand. Lord Holt says, in *Dyer's case* 6 Mod. 41, "It is abominable to convict a man behind his back."

In the absence of the parties thus convicted, two irregularities had place in the proceeding, against which they had no opportunity of objecting; but which, I apprehend, rendered the inquisition illegal. The statute 8 H. IV. ch. 9 expressly requires that the persons that are to pass on such an inquisition shall have lands or tenements of the yearly value of forty shillings. It appears that one of the persons in this case had no qualification of the kind, and therefore declined sitting, but, at the instance of a Mr. Capreol, was empannelled. This same person signs the inquisition as foreman, and his affidavit is before us, from which it appears evident that he is under the impression that Mitchell was the person whom the jury found guilty of the forcible entry. I mention this merely as shewing how little respect this proceeding seems to be entitled to, from the manner in which it appears to have been conducted. Then, again, it is sworn that Tayler was examined as a witness, the same person who was seeking restitution under the proceeding. It was established by a recent decision, that he was incompetent as a witness before the jury; and, as the defendants had no opportunity of object-



ing, the inquisition, on account of this irregularity, ought not to stand.

It is not necessary to dwell upon any of these points, because the first ground is substantial in its nature, and is fatal ; and, the inquisition being before us, we are bound, in common justice, to quash it ; and, for my own part, I must add, that if the inquisition had no such vice on the face of it, I should still not have thought it right to sustain it against the irregularities I have mentioned. It is stated in many authorities, that the court of King's Bench has a discretionary power over these matters, from an equitable construction of the statutes. Serjeant Hawkins is of that opinion, and states it in comprehensive terms, B. 1, ch. 64, sec. 63-66. "It is certain," he says, "that the justices of the King's Bench, having in general a superintending power over all the proceedings of justices of the peace, may set aside any such restitution, if it shall appear to them to have been either awarded or executed against law ; as when the indictment whereon it was grounded, being removed before them, appears to be insufficient, and thereupon is quashed—or the defendant traverses the form, and gets a verdict in the Queen's Bench ; or wherever it sufficiently appears that the justices of the peace have been irregular in their proceedings," &c.

It is objected here, that Mitchell, who moves against this inquisition, is not a party to the proceeding, and not entitled to move ; and that the court, therefore, cannot and ought not to interpose. As to that, I take it to be no objection against the court doing right in a criminal proceeding, which has been brought under their notice. If the party applying for the *certiorari* could not legally obtain it, for want of interest in the proceeding, that should have been shewn for cause against its issuing ; or the court might have been moved to set aside the *certiorari* and take the return off the file. But, in respect to the merits of this objection, it is to be observed that the complaint against Mitchell was made the ground of the whole proceeding. Tayler is sworn to have been put in by him to hold the place as his agent or servant ; and it is further sworn that



the person dispossessed by the magistrate held possession for him, and that he is the husband of the owner of the estate. Moreover, his application against this inquisition is supported by the affidavits of all the persons convicted. That he can be looked upon as a stranger in this case, because three other persons have been convicted upon a complaint made emphatically against him, and without notice to him, or to them, is more than I am prepared to assent to.

As to the fact of the alleged forcible entry, or, rather, as to the affidavits of Mitchell and others disproving it, I ground no opinion upon them; because we cannot try here, upon affidavits, the matter which the jury have found. Whether a forcible entry and detainer was sufficiently charged in the first instance, and whether it could not be clearly disproved, could have been tried (as I apprehend it could yet be tried), if the inquisition could be allowed to stand upon a traverse, which the defendants might file in this court, and therefore we can assume nothing respecting the merits of the case.

We quash the inquisition for the defect I first mentioned; and, upon the prayer of the party dispossessed, the court will award a writ of re-restitution.

SHERWOOD, J.—In the present case the inquisition is defective and clearly bad, and therefore ought to be quashed. It is a proceeding under the statute of 8 H. VI. ch. 9 and 21 Jac. I. ch. 25. On the former statute the indictment or inquisition must express that the place was the freehold of the party grieved at the time of the forcible entry or detainer; and on the latter statute, the indictment or inquisition must state the tenancy which the tenant held at the time of the injury, and what part of it was then unexpired. If the indictment is brought at common law for a forcible entry, it is only necessary to state the bare possession of the prosecutor, but in such case no restitution follows a conviction. In the present case the inquisition does not express what estate the prosecutor had, but merely alleges that he was possessed of the premises, which is not sufficient in a pro-



ceeding under those statutes.—Hawk. book 1, page 28, sec. 58; 1 Mod. 73; Salk. 260.

If the court of their own accord and without any application from the defendant, and indeed when he has no right to apply, can interfere to prevent an improper conviction from being carried into execution—which the authorities cited clearly shew they can—then I think, upon the same principle, they may interpose in this case to quash an illegal inquisition. That it is so I have no doubt, and therefore am of opinion the rule must be made absolute for quashing the inquisition.

Rule absolute to quash the inquisition.

### CAMPBELL V. BURR.

#### *Pleading.*

Debt on bond—condition “that if A. gives B. a good and sufficient deed in fee simple of &c., and as soon as the said B. pays up a note of hand this day given to said A. in payment of said land, then, &c.”

The defendant (A.) pleaded that he was willing and offered the plaintiff to give him a deed for the said land on his (the plaintiff) paying up the said note of hand, but that the plaintiff did not require and forbade the plaintiff to give said deed, and that plaintiff declared to defendant that he would not nor did he ever pay up said note, and plaintiff discharged defendant from giving him a deed, for which reason, and no other, defendant did not give the deed.

*Held*; plea bad on demurrer. *Macaulay, J.*, dissenting.

Debt on bond. The defendant cravedoyer of the condition. It ran thus: “The condition of this obligation is such, that if said Rowland Burr gives said Aaron Campbell a good and sufficient deed in fee simple, of fifteen acres of land, the south-east corner of, &c.: and as soon as the said Aaron Campbell pays up a note of hand this day given to said Rowland Burr in payment for said land, then this obligation to be null and void, &c.”

The defendant pleaded *actio non*, because always since the making, &c., he had been ready and willing, and offered to plaintiff to give him the said plaintiff a good and sufficient deed in fee simple of the said land upon his, the said plaintiff, paying up the said note of hand in the said condition mentioned, whereof plaintiff had notice; but that plaintiff required the defendant not ever to give to him a good and sufficient deed in fee simple of the said fifteen acres of land,



and plaintiff forbade defendant then or ever so to do; and *plaintiff declared to defendant that he would not nor did he ever pay up the said note of hand, and plaintiff wholly declined and discharged defendant from giving him a deed, &c., for which reason and no other, defendant did not give the deed.*

He also pleaded that he was always ready to make the deed upon the plaintiff paying up the note of hand in the condition mentioned, of which plaintiff had notice; but that plaintiff did not at any time since the making, &c. of the bond pay up or cause to be paid up the said note of hand, &c.

He also pleaded *actio non*, because plaintiff did not pay up, or cause to be paid up the said note of hand, (saying nothing of his own readiness to make a deed).

The plaintiff demurred to the first of these pleas specially—because no description was given of the note of hand; that it was simply said, plaintiff did not *pay up the note*; that the plea was double, relying on plaintiff's discharging defendant, and also on his not paying up the note.

To the second and third pleas he demurred specially, assigning the same objections, except the duplicity.

Cases cited:—Taylor, 176; East 340; 2 M. & S., 377; Hob. 296; 6 B. & C., 353; 4 B. & A., 268; 2 Dougl. 684; Cro. Jac. 165; 634; 3 Mod. 35; 9 Bing. 363; 2 M. & Scott 484.

ROBINSON, C. J.—It is argued that the first plea is not double; that all rests on the discharge. The plaintiff forbade him to make a deed, and said he would never pay the money, and did not, (which shews he did not retract his discharge) for which *reason* he says (not reasons) he made no deed: but on further reflection, I think it is double. The discharge is evidently mainly relied on as a defence, whether it be a good one or not. Then he pleads further the non-payment of the note, which is a condition precedent, and though that was pleaded, I think, merely as part of the other defence, it was from a distinct matter of defence on the plainest grounds; and if the plaintiff should leave it unanswered, the defendant must have judgment: the plea is



therefore, in fact, double, though probably not intended to be so. See 5 Wentworth 291, like this first plea.

It is a rule that a defendant pleading a defence negatively need not be particular, as when he pleads something affirmative. Thus to an indemnity bond, if he pleads that he did indemnify the plaintiff, he must shew how; but if he pleads the plaintiff was not damnified, that will do, and the plaintiff must in his replication state how he was damnified.

The reason of that does not satisfactorily apply here. The defendant there does not know in what respect the plaintiff may contend he was damnified, and cannot be more particular. When it is a bond to indemnify generally he can plead to no other, otherwise.

If the condition be to indemnify the plaintiff against a particular demand, &c., he can and must plead affirmatively that he did indemnify him, and shew how. Here it is as if the defendant had agreed to convey the land "after the plaintiff paid the purchase money,"—could the defendant plead the plaintiff "had not paid the purchase money," without saying how much, or averring positively that there was purchase money to be paid? Would it not be necessary that the defendant should aver that a sum was to be paid for the land, and then that, although the plaintiff was bound by his agreement to pay that before deed made, he had not paid it? It is within the defendant's knowledge, and he may bring the pleadings to a certain point at once, by setting out the particulars; but I cannot say on authority that he must. A replication, it is said, must be more certain than a plea, because it usually raises the issue; but when a plea is uncertain, (that is, not particular) the plaintiff, by his replication, has it in his power to fix it.

It is not a rule that a party relying on the performance or non-performance of a contract must set out the contract, when it has not before appeared, and when it is within his knowledge. Should not defendant here at once aver what note *was* given in pursuance of the bond from the plaintiff to him, that the plaintiff may know what note the defendant charges him with not paying under the condition, or else the parties might (as remarked in 4 E. R. 340) be disputing about



a different bond, as the defendant has simply said the plaintiff has not paid up the note mentioned in the condition. Could not the plaintiff simply answer that he did on &c. (giving time and place) pay up the note mentioned in the condition—that is, pleading affirmatively with time and place what the defendant avers he did not do, concluding to the country?

If the plaintiff could so reply, then they would be at issue about the payment of a note not particularly specified.

Such transactions as that which is the subject of this bond and condition are frequent in this country, and there must have been many instances in which the condition of a bond has alluded, as this does, to a condition precedent, which the purchaser was to perform, without specifying the particulars of that condition. Such instances, too, have doubtless occurred in England, though perhaps not many of them, from the fact of such contracts there being generally drawn up with care by professional men. I have looked in vain for any precedent of a pleading where such a condition existed and was first brought out by the defendant on oyer and first relied upon by him in his defence. I have been unable, also, to find any case in which the proper mode of pleading in such a case by the defendant has been discussed. We must therefore determine it upon principle, for the cases cited upon the distinction where the defendant in denying the breach by himself may plead affirmatively or negatively, and the degree of particularity which he is bound to observe in either case, do not in their nature, I think, apply to this question.

I take it to be a general principle, that where a party relies upon the performance or non-performance of a contract to which he is a party, he is bound to set out that contract. In this case he must clearly be taken to be cognizant of the particulars of the note alluded to. The fact he means to rely upon is, that the plaintiff did in fact give such a note to him, and that he has not paid it (not that he alluded obscurely to such a note in the condition). He relies on his not having paid a certain note, and ought, I think, to have set out the amount of the note and the time when it ought to have been paid. Then the plaintiff could at once have



denied that that was the note referred to in the condition, or might have replied that he had paid it, and the parties would then have been immediately at issue. But here, the defendant not having described the note which the plaintiff should have paid to him, the plaintiff, in replying, is left to set out and shew that he has paid it: then, if he does not set out the true note, the defendant must rejoin, denying that such note is the one referred to in the condition; upon which the plaintiff is to join issue: according to which course of pleading, the parties do not arrive at the question of fact to be submitted to the jury so early as they would if the defendant had set out the contract which he charged the plaintiff with not performing.

I take it to be a main object of pleading to bring the parties to issue upon some precise point, with as little circumlocution and delay as the nature of the case will admit of. Undoubtedly the defendant's plea directly imputes to the plaintiff the non-performance of what appears by the deed to be a condition precedent; and as the plaintiff in his replication can set out that condition and shew that he has performed it, I think, upon general demurrer, it must be held that the plea bars the action, and is, in substance, sufficient: but this demurrer is special, and throws upon the defendant the necessity of complying with the strict formal rules of pleading. If the condition here had been that the obligee should be entitled to a conveyance as soon as he had fulfilled a certain agreement respecting the land made that day between the parties, I cannot conceive that the defendant could be allowed to plead that the plaintiff had not performed that condition precedent, without in any manner averring what it was. But if he could not so plead in such a case, neither could he in this, since this is only in a degree more particular, but not sufficiently particular to shew the identity of the contract.

On the whole, I think this plea bad on special demurrer.

MACAULAY, J.—The pleas of the non-performance of the condition precedent appear to me to be sufficiently certain. If the plaintiff had set out the condition of the bond in his



declaration, and had suggested for breach the non-conveyance of the land, without averring payment, or tender, or offer of performance of the condition precedent as it appears on the face of the condition, the defendant might have demurred. This proves that a condition precedent or concurrent, requiring performance or offer to perform, is manifest on the face of the condition ; and as a plea to such condition, set out on *oyer* in excuse of performance on the defendant's part, it seems to me enough for him to deny negatively performance of a condition precedent on the plaintiff's part in the terms of the instrument, when the existence of such condition precedent is apparent with sufficient certainty on the face of the bond to require the court to notice it judicially. The bond set out on *oyer* becomes, strictly speaking, a part of the plaintiff's declaration ; and had the plaintiff assigned a breach thereon without noticing the condition precedent, the defendant, instead of denying, might have pleaded its non-performance in the terms of the bond. When it once appears that there is a condition precedent, and it is admitted, as by this demurrer, that it is not performed, it is of no moment to the defendant's object in urging it what the amount or payment was to be. It is enough for his purpose that there is a condition. It is for the plaintiff in reply to aver performance with requisite certainty on his part, as claiming a right of action thereupon.

If the defendant was in his place and suing for the money, it would be different ; then more certainty would be exacted of him.

This disposes of the third and fourth pleas. As to the second, I am of opinion that if either part of it would alone constitute a good defence, then it is double. If that part of it which relates to an alleged discharge from giving a deed could be properly treated as inducement only leading to and prefacing the averment of non-payment, it might not hurt or might be rejected as surplusage ; but I do not see any necessary connection between the two : the one is not material to an explanation or understanding of the other. Nor do I think the first part of the plea would of itself constitute a good defence, supposing there was no



condition precedent. A parol dispensation of performance of a covenant or obligation under seal is invalid. It should also be executed under seal.

The form pursued in Chitty's Pleadings is, I think, misplaced. It is classed among pleas to bonds, to which it is inapplicable, and is founded on the case in Dougl. 684, which was an agreement not under seal. That case shews that if the present defendant were, as a plaintiff, suing for the money, and were obliged to shew performance, or an excuse thereof, on his part, the offer and discharge alleged would be sufficient to entitle him to do so. The converse does not hold : it does not follow that, supposing the mere existence of any condition precedent on the plaintiff's part, the defendant can resist his absolute sealed undertaking to convey by pleading a parol discharge upon his offering to do so. He should have gone further, and shewed that he sealed and tendered a deed actually executed ; in other words, that he did all in his power to do without the concurrence of the plaintiff. If the plaintiff refused to accept the deed it would be his own fault ; a tender of it after being sealed would exonerate the defendant. I do not, therefore, consider the second plea to be, strictly speaking, double, as the first part of itself would not amount to a valid defence ; and as a defence, it would only be sustainable upon the latter part denying performance of the condition precedent, which is admitted by the demurrer if well pleaded. That, I think, is well pleaded ; but I am disposed to the opinion that the plea is bad on special demurrer, as being inartificial and double in point of form and meaning, the defendant having manifestly intended to meet the action by shewing a readiness and offer to perform dispensed with in sufficient legal form to exonerate him from his obligation to convey. Such was intended to form the gist of the defence under this plea, and it seems to me invalid in law.

The judgment should therefore be for the defendant on the third and fourth pleas, but for the plaintiff on the second for informal and insufficient pleading.

McLEAN, J.—The demurrer to the second plea in this



case is founded on a variety of reasons, which equally apply to the third and fourth pleas; but it is only on a distinct ground, which only applies to this plea, "that it is double and multifarious, and contains several distinct matters of defence." If the payment of the note of hand referred to in the condition of the bond is to be regarded as a condition precedent, the non-payment of that note properly pleaded, would form a distinct and good ground of defence; and if a parol direction to the defendant not to execute a deed could in law operate as a discharge to the defendant from the performance of an act which he was bound by an instrument under seal to do, this would also form a distinct ground of defence. It is evident that the defendant relies on both of these grounds, and, though he is mistaken in supposing that he could be discharged from giving a deed by any other means than by an instrument under seal, yet inasmuch as this verbal discharge is offered as a defence, and is pleaded with other matter which would of itself form a good ground to bar the plaintiff's recovery, I am of opinion that the plea must be regarded as double, and bad on that account.

The third and fourth pleas aver that "the plaintiff did not at any time pay up the note of hand in the condition of the writing obligatory mentioned, according to the tenor and effect thereof;" and the demurrer to these pleas is principally on account of the note not being particularly described and set out. It is clear that no issue could be taken on these pleas, and that it is only by the plaintiff's replying and pleading payment, or an offer to pay the amount of the note, and setting out its date, tenor and effect, that the parties could come to issue.

The plaintiff might have done this had he chosen, but I do not think he was bound to do so. He had a right to say, as he has said, to the defendant, "You allege that I have not paid up a promissory note, and you rely upon my not having paid it up as a good reason for your not giving me a deed. As you have referred to this note, you must shew what note it is, and not throw it upon me to help your plea by my replication."



In the case of *Hill v. Montagu* (2 M. & S. 377) it is said in general terms by Mr. Justice Bayley, that "the party who pleads a contract must set it out if he be a party to the contract. It lies as much within the knowledge of the defendant as of the plaintiff."

In this case it became necessary for the defendant to plead the non-payment of the note, and as the note must unquestionably be still in his own possession if unpaid, there is no reason why he should not be required in his plea to set it out, and thus enable the plaintiff to take issue, without unnecessarily extending the pleadings. On these grounds I think the second and third pleas are defective, and that the demurrer must be sustained.

In reference to the words in the condition of the bond for a deed "as soon as he the said Aaron Campbell pays up a note of hand," I am inclined to think that the payment of the note and the giving a good and sufficient deed must be considered as concurrent acts: for if the note is to be *first* paid, the giving a deed cannot be *as soon as* the payment is made, but must be *after it*.

It may have been intended by the parties that neither would trust the other, and that the deed and the money should be handed over at the same time from the one to the other. If, however, a time is specified in the note for its payment, or if payable on demand, then its payment would be regarded as a condition precedent; but as the note is not set out in the pleadings, we are left in the dark as to this point.

Considering the payment of the note and the giving a deed as concurrent acts, the pleas would be bad on this ground also.

JONES, J.—The defendant, in his second plea, tenders these issues, either of which, if proved in his favor, would be a good defence: first, that he was discharged from the performance of his bond, and secondly, that there was a condition precedent to be performed on the part of the plaintiff. The plea is therefore bad on that account. But it is also liable to the same objections which apply to the others,



—viz., that the defendant has not set out the note referred to. This, it has been argued, is unnecessary, because, although a party pleading performance is bound to shew what the agreement was, it is alleged that he, the defendant, merely affirms that the plaintiff did *not* pay up the note in the terms of the agreement. This might, perhaps, suffice if the undertaking was general, but it being for the performance of a specific act—viz., “to pay up a certain note”—I think it incumbent upon the defendant to shew the terms of the note quite as much as if he had been affirmatively averring performance on his own part. When the defendant alleges that the plaintiff “did not pay up the note,” it should be shewn what was to be paid and how it was to be paid; and I see no reason why the principle does not here apply as laid down by Mr. Justice Bayley, in *Hill v. Montagu* (2 M. & S. 377,)—“I have always understood that a party pleading a contract should set it out, if he is a party to it. It lies as much within the knowledge of the defendant as the plaintiff.” In this instance, it lies more particularly within the knowledge of the defendant, because it was in his possession.

I am therefore of opinion that judgment should be given for the plaintiff on the demurrer.

Judgment for the plaintiff on demurrer.

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#### ELLIS V. WADDEL ET AL.

##### *Survey.—Description.*

The front half of a lot supposed to contain in all two hundred acres, but in reality consisting of more, was construed to mean half the real quantity.

The plaintiff owned the north half of a lot of land in the Township of Clark, and the defendant Waddel the south *or front half*. The whole lot was intended to contain 200 acres, and was described accordingly as being 200 chains in depth.

When Ellis made his improvements, he commenced at 100 chains from the front, and placed there his division fence between himself and Waddel.

The survey of the lot on the ground much overran the described quantity, so that, in fact, instead of 200 acres



only, the lines embraced rather more than 220 acres. After this had been ascertained, Ellis continued, as he had done for some years before, to occupy all the lot north of the first 100 acres, instead of confining himself to the *rear half* of the lot, and began to mow the hay growing upon the space, which, by dividing the lot into halves, would fall to Waddel. The latter forbid his removing the hay, and with the assistance of the other defendant, Gardner, he took away all the hay from that piece of land, and removed the fence further back to the proper division line. It was for these acts the present action was brought.

*Per Cur.*—With respect to the hay, there is no doubt it belonged to the defendant Waddel, and there can be no recovery on that account. The rails, to be sure, were made, as it appears, by Ellis, but they were not shewn to have been made on Ellis's land: on the contrary, the probability is, that they were made from timber on or near the spot, in which case they would be the property of Waddel; and, at any rate, they were not destroyed or taken away, but only removed to Ellis's own land, or the boundary common to both.

The verdict for the defendant seems to us proper.

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#### DOE DEM. COURT V. TUPPER.

*Execution—Term of years.*

A term of years cannot be sold under an execution against lands and tenements.

In this case the point reserved for the consideration of the court was, whether a lease for years can be sold under a *fi. fa.* against lands.

ROBINSON, C. J.,—It is clear that, upon a *fi. fa.* against goods and chattels, lands and tenements cannot be sold. Our provincial statutes, as well as the statute 5 Geo. II., ch. 7, treat them as distinct subjects of execution, under the very words of lands and tenements. In a will, where language is construed with latitude, a devise of lands and tenements will not pass leasehold estate; still less would a deed, and less still would those words, when used in a legal process, admit of such latitude of construction.



MACAULAY, J.,—The statute 5 Geo. II., ch. 7, renders houses, lands, hereditaments and other real estate saleable in satisfaction of debts. Formerly executions included goods and chattels, lands and tenements under this statute, when no question like the present could arise, as the writ equally authorised the sale of the term for years, whether regarded as a chattel interest or real estate; but our provincial statute prohibits their being included in the same writ, and requires goods and chattels to be first exhausted. It may therefore, not unreasonably be inferred that all assets properly subject to the process against goods and chattels should be first disposed of, and that the writ against lands and tenements only means real estate, strictly so called. A year is to intervene between the delivery of the writ and the sale, within which a short lease might expire. I am by no means satisfied a term for years might not be sold under either writ; certainly under an *elegit* the sheriff may extend a moiety of such an interest, or he may sell it under a *fi. fa.*, or deliver it, under the *elegit*, as chattels. The statute of Westminster mentions *lands*; and if a moiety is extended it would seem to be under that head, and not as goods or chattels. My brothers being clear upon the point, and there being very good reasons for the opinion they hold, I am not prepared to dissent, but the inclination of my opinion is, that they may be sold under either writ.

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#### HILARY AND EASTER TERMS, 1 VICTORIA.

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[The Reporter has been unable to find any of the judgments of the court delivered in these terms. It will be observed also that Mr. Cameron's Digest contains no mention of any cases decided during the same period.]



## TRINITY TERM, 1 &amp; 2 VICTORIA.

## ANGUISH V. HOUSE ET AL.

*Promissory note—Illegal contract.*

*Held*, that money paid on a promissory note given for the value of goods which were to have been smuggled into the province, could not be recovered back in our courts.

Assumpsit for money paid.

The plaintiff became guarantee or joint maker of a note with the defendants to a merchant in Buffalo for tea, but by the defendants to be smuggled to Canada, which the plaintiff knew and in which he assisted. Having since been obliged to pay the debt, he brought this action, and the defence was rested on the illegal nature of the transaction.

*Per Cur.*—The vendor, being no participator, could have sued either the plaintiff or the defendant in our courts and recovered, but not if he participated to the same extent as the plaintiff did. Upon the evidence the plaintiff appears to have stood in the nature of a joint principal in the purchase, and a *particeps criminis* in smuggling the tea, which he joined in buying, knowing that it was to be smuggled. Under such circumstances, though a foreigner and a foreign transaction, a remedy as upon an implied assumpsit in law does not lie in his favour in our courts.

## MUIRHEAD V. McDougall ET AL.

*Bond for a deed—Tender and refusal—Delivery.*

In a bond for a deed, where the condition required that a deed should be “executed and delivered” before a certain day,

*Held*, that the due execution of the deed before the day, and forwarding it to a third party for the obligee, though it was not received until after the day, was a sufficient delivery under the terms of the bond.

Debt on bond dated the 14th of May, 1836, with a condition that the obligees should, within a year from the date, “cause or procure to be executed and delivered unto the said Deborah Muirhead, her heirs, executors, administrators or assigns, a deed of release, or deed without covenants, from one John McNab, of certain premises, &c.”

The defendant pleaded *non est factum*, and several special



pleas, which were demurred to, except one, which was, that a deed was tendered to the plaintiff and refused.

It was shewn at the trial that before the day a deed was signed and sealed by the attorney of McNab, lawfully authorised, and was sent from Cornwall, where it was executed, to a third party at Toronto, to be forwarded to the plaintiff at Niagara; but it was not received by the plaintiff before the 18th of May, four days after the day named in the condition. In the mean time—namely, on the 15th of May—the plaintiff assigned the bond to one Clement, who brought this action in his name. The plaintiff had a verdict at the trial, with damages assessed upon the breach at £500, and leave was reserved to move to reduce the damages, or for a nonsuit, if the court should be of opinion that the condition of the bond was fulfilled.

It was objected at the trial that it was not fulfilled: first, because the deed was executed by *attorney*, a title which a purchaser is not bound to accept; secondly, because the condition of the bond required that the conveyance should be delivered into the hands of Mrs. Muirhead on or before the day named.

ROBINSON, C. J.—With respect to the first point, the objection has been made without referring to the bond, in which it will be seen that it was within the intention of the parties that a deed should be made by the agent or attorney of McNab.

Upon the second point, it turns upon what was intended by the parties by the word "*delivered*," as used in the condition. Undoubtedly the deed being signed and sealed and delivered to a third person for the use of the obligee, not as an excuse but with the intention of parting with the possession and control over the deed, the estate conveyed by it passed, although such third person had no authority from the obligee to receive the deed. The reason is, that the party will be presumed to assent to the act done for her benefit (11 East 623); and it would be unreasonable to compel the party to make a personal delivery of the instrument to the grantee, because she might not be found on the day, and such a delivery might be impossible.



In the case of *Alford v. Lee* (Cro. Eliz. 54) this point is so stated; and in the modern case of *Doe ex dem. Garmans v. v. Knight* (5 B. & C. 687) the doctrine is very fully treated, and the authorities reviewed in an elaborate judgment, which fully establishes the position I have mentioned. In several of the cases there referred to the distinction is taken that when a particular place is not named for the delivery, a delivery to a stranger for the use of the grantee or releasee will suffice. Here no place is mentioned; but nevertheless the words of a condition may be such as to shew it to be the intention of the parties that the deed shall be actually delivered to the obligee in person, and of course when that is so we must see that the intention is carried into effect—the words here are the “obligees” shall cause or “procure to be *executed and delivered* unto the said Deborah Muirhead, her heirs, executors, administrators or assigns, a deed, &c.”

Undoubtedly the proper legal meaning of *delivery* has reference to that final act which is necessary to make the estate pass; that is the declaration express or implied, that it is delivered to the use of the grantee, which delivery may be as effectually made in the absence of the grantee as in his presence—4 Cruise's Dig. 8, 28. And it appears to me that the reasonable reading of this condition is, that the obligees shall cause to be executed and delivered a deed of release from the said John McNab unto the said Deborah Muirhead, her heirs, executors, administrators or assigns; for how could the obligees venture to bind themselves to make a personal delivery of the deed into the hands of Mrs. Muirhead's heirs, who might be in a distant country, or not be found, or her assignees, of whom they might know nothing?

These words are inserted, I conceive, with reference to the kind of title to be made—namely, to her, her heirs, &c.; and not with reference to the persons who are to take a personal delivery of the deed, though, in either case, they are not accurately used.

If the verdict were not otherwise improper, the damages are altogether excessive, being founded, as the evidence shews, upon the value of the estate, whereas the estate is now at this moment vested in Mrs. Muirhead by the execution



and delivery of the deed, and the only damage that can have been sustained under any construction of the evidence is for the non-delivery of the deed into her hands.

There should be a new trial for excessive damages, for the plea of tender was clearly not supported by evidence, and therefore the defendant cannot have a verdict.

Rule absolute.

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CUNNINGHAM V. MARKLAND.

*Taxes—Redemption.*

The defendant, as treasurer, returned the plaintiff's land as part of a tract on which taxes were unpaid. The plaintiff tendered the amount of the taxes on his own portion, which the defendant refused to accept, and the land was sold by the sheriff.

*Held*, that an action would not lie against the treasurer for not accepting the redemption money, the tender to and refusal by the latter of the money being equivalent to payment, and that therefore the plaintiff had not lost his land.

**ACTION** on the case. The plaintiff was possessed of 200 acres of land, which was returned by the treasurer as part of a *tract* on which the taxes were unpaid, and the *whole* tract was sold to one W. Robertson for taxes. The plaintiff, before the expiration of a year from the day of sale, tendered to the defendant, as treasurer, the amount of taxes with the costs and charges on his own 200 acres, a part of the tract, and at the same time exhibited his patent. The defendant refused to accept the amount, unless the amount due on the whole tract, of which this was returned by the Surveyor General as a part, were paid. The plaintiff refused to pay on any except his own part, and the treasurer having given a certificate that the tract was not redeemed, a deed was given to the purchaser for the whole by the sheriff. This action was brought against the treasurer for refusing to accept the redemption money, whereby it was alleged the plaintiff lost his lot of land. Verdict was for the plaintiff by consent for £200, subject to the opinion of the court as to his right to recover.

McLEAN, J., delivered the judgment of the court.

By the 12th section of the act of 1819 for the assessment



of lands, the Surveyor General is required "to furnish the treasurer of each district with a list or schedule of the lots in every town or township in his district, as the same are designated by numbers and concessions or otherwise upon the original plan, in which list is to be specified in columns opposite to each lot to whom the lot, or any and what part, has been described as granted by his majesty," &c., and by the act 6th Geo. IV., chap. 6, sect. 6, the treasurer is required to lay before the Quarter Sessions an accurate account of all lands in his district upon which taxes may be due for eight years, "specifying in such account the lot or parcel of land by the number, concession and township or otherwise, as the same appears in the schedule furnished." By the 7th section, the clerk of the peace is required to make out a writ for the levying such taxes in arrear, "specifying in such writ the particular lot or parcel of land and the amount due thereon." Under the 17th section of the last-mentioned act, the proprietor of the lot, or any one in his behalf, might redeem, by paying to the treasurer, within twelve calendar months, the amount levied and the expense, and 20 per cent. in addition to the same, to be paid to the purchaser, whose right should from thenceforth cease, and the proprietor might resume possession of the *parcel* of land sold.

This action can only be sustained upon the ground that the plaintiff has lost his land by the refusal of the defendant to do what the law required him to do, in order that the lot might be redeemed. The question then is, has the plaintiff lost his land, as he has alleged, by the defendant refusing to accept the redemption money of the plaintiff's portion of the lot? It is obvious that the law does not contemplate that when a lot of land is sold for taxes any person shall be at liberty to come in and redeem a *portion* of such lot by payment of a portion of the tax. If this were practicable, then in all cases where only a part of a lot is sold, the proprietor might redeem that part, leaving the residue of the lot unpaid for, and thus defeating the very object of the law. If, however, the Surveyor General's schedule specifies distinctly the names of several grantees for several



parts of the same lot of land, it is not a matter within the discretion of the treasurer to return such whole lot as granted to certain individuals, and thus make the whole lot liable for the tax on each of its parts. It does not appear in this case how the lot in question A, in the 6th concession of Sidney, was returned by the Surveyor General. If the name of the plaintiff is returned as the grantee of 200 acres, and the name of some other person for the residue of the lot, then no act of the treasurer could render the plaintiff's land liable for the tax due on the other portion, and the plaintiff would clearly be entitled to redeem his own part without paying for the whole lot. Admitting then the plaintiff's right to redeem, under these circumstances, and it being in evidence that he tendered the amount necessary to redeem his own part, the question arises, has the defendant's refusal to accept been the means of depriving the plaintiff of his land? It is clearly established between parties that tender and refusal are in all cases equivalent to performance of any act. The same principle, we think, must apply in this case; for it never can be admitted to be in the power of a treasurer, by a perverse or obstinate refusal to accept the amount tendered to redeem lands, to deprive the owner of such lands. In this case the plaintiff did all that was in his power to do to redeem his lands—he tendered the amount to the person whose duty it was to receive it, and having done so, we consider such tender and refusal of the treasurer to accept as to him equivalent to a payment, and that therefore the plaintiff has not lost his land and cannot sustain this action against the treasurer.

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### SMITH V. RIORDAN.

#### *By-law—Corporation.*

Under the act of the legislature incorporating the town of Port Hope, the corporation have power to enforce regulations preventing cattle, swine and other animals from running at large by impounding and selling them, as well to liquidate damage occasioned by their so doing as a fine imposed.

\* The points reserved at the trial of this cause were

First, the authority of the Board of Police of Port Hope by law to establish a regulation to seize and sell hogs found running at large within the town.



Secondly, if the Board have authority to establish such a regulation, that the defendant has not pursued the course prescribed by the regulation which has been established.

McLEAN, J., delivered the judgment of the court.

On the first point, the 18th clause of the act 4 Wm. IV., ch. 26, incorporating Port Hope, gives to the corporation authority "from time to time to establish such ordinances, by-laws and regulations as they may think reasonable within the town," for various purposes and amongst others "to restrain and prevent any horses, cattle or swine from running at large—and to make such rules and regulations for the improvement, good order and government of the town, as the corporation may deem expedient," not repugnant to the laws of the province, except in so far as the same may be virtually repealed by that act, and to enforce the due observance thereof by inflicting penalties on any *person* for the violation of any by-law or ordinance not exceeding £1 10s.

The corporation under this clause had an unquestionable right to make such a by-law or regulation as they thought reasonable to restrain or prevent swine from running at large; and as the town of Port Hope could be no longer subject to the regulations of the township meeting, it was proper that power should be exercised in a manner not repugnant to the laws of the province.

In pursuance of the power given, the corporation appointed a pound-keeper, and he acting under the authority of the Board of Police, received the hogs and sold them, pursuant to the regulation or ordinance established to restrain hogs from running at large. The hogs were sold in the first place to pay individual damages occasioned by them, and then to pay a penalty incurred by their being at large. If they were liable to be sold on either account, then this action cannot be sustained. It is stated and not denied that this corporation could not establish any regulation which should create a forfeiture unless express power be given under the act by which it is constituted. It does, however, appear to us that a power from time to time to establish such ordinances, by-laws and regulations as the corporation



may think *reasonable* within the town to prevent swine and other animals from running at large, does confer on the corporation full power to establish such a regulation as that under which the hogs were sold, and that the corporation is not confined to the infliction of a penalty of thirty shillings on the owner of the hogs.

To enforce the observance of any regulations by individuals, the Board has power to levy a fine not exceeding thirty shillings, but this appears to us to have been intended only for a *personal* violation of any by-law or ordinance, and not to apply to the case of swine or other animals running at large, with respect to which, such a regulation would in many instances be wholly ineffectual from the circumstance of the owners being unknown.

The power exercised by the corporation is necessary to restrain such animals from running at large, and is not, in our opinion, repugnant to the laws of this province. If the town of Port Hope were not incorporated, then the township of which it formed a part would, at the ordinary township meeting in January, have power to say whether swine should run at large or not; and if restrained from running at large, or if taken damage feasant, the law would in such case provide for the sale. The power which in ordinary cases belongs to the township meetings, is by the act of incorporation vested in the Board of Police, and they have, besides the mere power of saying whether they shall run at large or not, authority to establish such regulation or by-law as they may think reasonable to restrain them from going at large. The passing of such a by-law or regulation by the board is sufficient evidence that it was thought reasonable. With this view of the case, we are of opinion that this action cannot be sustained.

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REA V. GILLILAND.

In an action of *replevin* where the court below found in favour of the plaintiff on demurrer to the first cognizance, and in favour of the defendant on demurrer to his replication to one of several pleas in bar of the second cognizance, and a general judgment was therefore given in defendant's favor, awarding damages and a return of the goods, *Held*, on appeal, that such judgment was erroneous.

This case came before the court from the District Court, on



a writ of error. It was an action of replevin; the defendant, as bailiff of one Dittrich, avowed the taking of the goods as a distress for rent, in two pleas, in which the demise was differently stated. The plaintiff pleaded several pleas in bar of the first cognizance, and demurred specially to the second.

The defendant replied specially to the third plea in bar of the first cognizance, and the plaintiff demurred to his replication.

The court below adjudged the second cognizance to be bad, and they adjudged the defendant's replication to the plaintiff's third plea in bar of the first cognizance to be sufficient; "wherefore they considered that the defendant have judgment and a return of the goods and chattels, together with his damages to be adjudged to him," &c.

The plaintiff in error assigned the common errors.

*Per Cur.*—It is evident that the judgment is erroneous, for a general judgment is entered for the defendant, and a return of the goods and chattels awarded, as the consequence of the court giving judgment in his favor upon his replication to one of several pleas in bar of the avowry; but if either of the other pleas in bar of the avowry be ultimately found in favor of the plaintiff, on the trial of the issues in fact raised upon them, he will be entitled to a general judgment in his favor upon the first avowry, as well as upon the second under the demurrer decided in his favor. The judgment should have been for the defendant only upon the plaintiff's third plea in bar.

Judgment reversed.

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#### SMART ET AL., EXECUTORS OF INNES, V. BROWN.

*Money had and received—Agreement.*

An action for money had and received as the purchase money of an estate will not lie, so long as the vendee enjoys the estate and continues in possession.

**ASSUMPSIT** on the common money counts.

The defendant owned a farm in the township of Hamilton, commonly called the Wilder farm. The testator, Innes, wished to purchase it, and being aware, it seemed, that Mr.



J. G. Bethune was authorised to sell it, he applied to him, in September, 1833, offering £500 for the farm.

On the 16th of September, 1833, Bethune wrote to Brown as follows: "Dear Brown, I will thank you to send me a draft on some person at Montreal for £400, at sixty days, to help me through my present necessities. I shall probably sell your Wilder lot. Shall I take £500 cash—let me know per bearer. (other matters.)

(Signed) J. G. BETHUNE."

The same day Brown wrote this answer:—

"Dear Sir—(other matters.) The Wilder farm cost me more than £500, with the interest and expense since I bought it, as times are turning out; take that sum, if you can do no better; I ought to get £650 for it. (Other matters among which), I send you a draft on A. Millar & Co., for £400, at sixty days.

(Signed) JOHN BROWN."

Mr. Bethune was examined as a witness at the trial, and stated that, as the agent of Brown, he agreed with the testator Innes, on the 28th of September, 1833, to sell to him for £500, and that he took Innes' drafts on Scotland for £500, and informed Brown that the bills had been taken by him, and that he would credit him with the amount when received: he stated he did receive the money in due time, and credited Brown with the amount: that at the time he received the money, Brown was indebted to him in a greater amount: that he rendered account to Brown in August, 1834, in which he gave him credit for this £500, but Brown struck out this credit, as he had not received the money, (and did not mean, as it seemed, to abide by what Bethune had done.)

The bills were paid when due; were drawn on Scotland in favor of Bethune, and he sent them to his correspondent in Montreal, who credited Bethune with their amount on the 8th of October, 1833; but it seemed from the rest of Mr. Bethune's evidence that this was only a conditional credit, for he declared that he did not negotiate the bills, and would not have credited Brown the amount if he had desired it, before he himself got the money.



Innes went into possession with his family immediately on giving the bills; he died in possession, and his family continued to reside on the farm and were still there.

Mr. Bethune declared that after the bargain was made (but he did not say when) he mentioned to Mr. Brown that he had received bills on Scotland, and did not remember whether he made any remark on the subject or not.

In May, 1836, Brown told Bethune that he would never give a deed of the land, because he had not received the purchase money, and because the sale was too cheap.

It was in October, 1833, that Innes went into possession; the farm was on the main public road between Port Hope and Cobourg and not far from Brown's residence. It was proved that in the summer or autumn of 1834, Brown went on the land and claimed it, saying that Bethune was only authorised to sell for cash. Before this time, Mr. Bethune's affairs had become involved.

On the 3rd of April, 1834, Bethune wrote thus to Brown:—

"My dear Sir,—Dr. Innes, who purchased the Wilder farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid I shall account to you for the amount—five hundred pounds. This transaction is entirely out of our other business. I sent the bills to Scotland through W. Bradbury & Co., and the moment they advise payment I can draw for the amount. If you will make a title to the land and leave it with Mr. Moffatt to be given up on your order."

It was not shewn what notice Brown took of this letter, or that he did anything upon it. On the next day (4th of April, 1834), Bethune wrote to Mr. Henry, a friend: "Dear Robert,—Mr. Brown being very urgent for the money for the farm purchased of him for Dr. Innes, I have to request that if the order on you is accepted, you may pay Mr. Brown £500, and I will give you a bill for the same. I forwarded Dr. Innes' bills to Scotland, and did not negotiate them; they have been accepted but I have as yet no account of the money."

On this Mr. Henry indorsed an answer—"Should the within mentioned letter of credit be accepted, I will retain the within mentioned sum of £500 for Mr. Brown, or order."



ROBINSON, C. J., delivered the judgment of the court.

Upon this statement of facts, there appears little reason to doubt that a difficulty would not have arisen between these parties if Mr. Bethune's affairs had not fallen into confusion. Unless under circumstances very peculiar, any one having a farm to sell, and willing to take £500 for it, would gladly receive a sterling bill for the whole amount, even at six months, and provided it were punctually paid would not insist upon the difference between such an arrangement and a cash payment.

Nothing is said in the evidence about any allowance for premium on the bill, and we are not informed whether it was taken at par or not. If it were, the advantage to Brown would more than compensate for the delay beyond the usual time of sixty or ninety days: but we do not know what was agreed upon in this respect.

Unfortunately, Mr. Bethune, after taking the bill and ultimately receiving the amount through his agent at Montreal, has fallen into pecuniary difficulties; in consequence of which Brown has been paid nothing, though Innes has been long in possession of his farm. If Mr. Bethune continues unable to make good the sum, a loss must light somewhere. The amount is considerable; and so far as we can be influenced by any sense of hardship in the case, we must look fairly at both sides. If Mr. Innes, in dealing with Bethune as Brown's agent, acted with due circumspection and did not venture to enter into a contract with him which was beyond the scope of his authority, it would be hard and unjust indeed that his estate should suffer so heavy a loss, merely because Brown's agent has acted improperly, or been unfortunate. And on the other hand, before the loss could be saddled on Brown, and before he can be compelled to part with a property for which he has not received the least value, it ought to appear clearly that his agent has so acted as to bind him to the full extent by all that he has done. In that case only he can be called upon to submit to the loss.

If this evidence went no further than to shew that Brown had authorised Bethune to agree with any purchaser for the



sale of the farm at a certain price, then the question would occur whether such an authority would give Bethune power to receive the money, so that a payment to him would bind the principal and discharge the purchaser. Upon that point there is a recent decision, and other authorities to the same effect might be referred to ; but the objection here is not that Bethune was not authorized to receive the money, but that his instructions were to take money and nothing else ; and the letters given in evidence seem to preclude any doubt as to Mr. Bethune's authority to receive the £500 at the time of the sale, if Mr. Innes had then paid it to him.

Brown contends that this was not done—that he gave no authority to sell on other terms: and he refuses on this ground to be bound by Mr. Bethune's act, and sets the executors of Innes at defiance.

If the executors, the plaintiffs in this suit, had brought their action against Brown for breach of an agreement to convey, we should then have been called upon to determine whether the correspondence produced at the trial supplied such evidence in writing of the agreement as would be sufficient to charge Brown under the Statute of Frauds: or if we thought it did not, then whether, after what had taken place, the case could be treated in a court of law as being taken out of the statute by part performance.

Upon these points we abstain at present from pronouncing an opinion. The plaintiffs have not sued upon the agreement, but have brought their action upon the common money counts only, and they seek to compel Brown to refund the £500, as money had and received to the use of Innes, the testator. If the possession of the place had been given up, then there might have been some color for such an action, and the defendant would have been driven to resist it, first, on the ground that Innes having long enjoyed possession, the parties could not be placed in *statu quo* ; that the contract could not, therefore, be rescinded and the money demanded to be returned: and secondly, that upon the whole transaction he was not liable, in consequence of Bethune's having exceeded his authority, and sold the farm without receiving payment in money.



But that Innes, in his lifetime, or the executors since his death, can remain in possession of the farm, enjoy this benefit under the contract, and at the same time bring this action for money had and received, which can only be sustained upon the footing of its entire abandonment, is, in our opinion, wholly out of the question. We are compelled to say that the verdict which has been rendered for the plaintiffs must be set aside and a new trial granted, without costs.

It will be for the plaintiffs to determine, as they may be advised, whether they will abandon the possession, and then commence a new action upon the same principle as the one they now have brought; or whether they will sue for damages for breach of an agreement to convey the land.

Rule absolute for a new trial, without costs.

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DOE DEM. SMITH V. SHUTER ET AL.

*Execution—Lands—Executor.*

The lands of a testator may be sold on a judgment against one of several executors, in the same manner as if judgment had been against all.

In this case the point submitted to the consideration of the court was this: of two executors one only administered, the other did not formally renounce, but he did not administer and was not included in the probate. An action was brought against the executor who acted, and, upon a judgment obtained an execution against lands, the real estate of the testator was sold.

It was objected that as the estate in the land must be considered as vested in all the executors for the purpose of paying debts, it could not be legally sold under execution against one of them.

ROBINSON, C. J.—I am of opinion that there is nothing in this objection. It was proper to bring the action against that executor alone who administered; and, even had they both administered, the suing of the one only, if the other had not pleaded in abatement, would have entitled the plaintiff to have obtained judgment and satisfaction out of the personal estate of the debtor; and, under the 5 Geo. II.,



ch. 7, the lands are subject to the same process and proceeding for the satisfaction of debts as goods and chattels.

Besides it has never been decided here that the estate is, in such a case, actually vested in the executors, but only that it remains subject upon a judgment against the personal representative of the deceased debtor. When executors are empowered to sell lands, and one of them refuses the trust, the others are expressly enabled to sell by the statute 21 H. VIII., ch. 4, and this statute has, by equitable construction, been extended to the case where the executors take as devisees under the will.

MACAULAY, J.—Any imputation of fraud in the judgment under which the defendants claim must be considered as repelled to the satisfaction of the jury at the trial; and I am of opinion the judgment warranted a sale of the lands under the statute 5 Geo. II., ch. 7, and the decisions of this court touching its construction.

Judgment for the plaintiff.

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### SPALDING V. MCKAY.

*Bill—Acceptance—Money received.*

A defendant cannot be charged as an acceptor of a bill that has already been accepted, though conditionally, by the drawee; and to make him liable for money received, it must be shewn that he did receive money which he could and ought to have applied to paying the acceptance.

The plaintiff sued for money received to his use.

The defendant was treasurer of the district of Bathurst. One Watson had been treasurer, and while he was treasurer, one Reade being clerk of the peace, and indebted to Spalding, drew an order, or bill, on Watson as treasurer, at sight, in favor of Spalding, for £51 4s. 3d. (on 14th of June, 1832) and Watson accepted this "payable when he had funds of the district to do so"—and having thus accepted it he charged the district with the amount.

Watson died and the defendant became treasurer in his room, and on this bill being presented to him, he accepted it thus, "Accepted, J. McKay, treasurer," and after this acceptance he paid a small part of it on account.



McKay became administrator of Watson, who died in September, 1832.

On the 30th of March, 1833, McKay rendered an account to the district—"District of Bathurst in account with the treasurer"—not distinguishing between his own items and those in the time of Watson; and in this account he charged the district with £55 5s. 6d., under "June sessions, 1832," as paid to the clerk of the peace.

Before rendering this account, a settlement had been made of Watson's account with the district, and he was found in arrear £359 8s. 6d., which was paid to the district out of his estate; and upon this settlement credit was taken by his estate for £55 5s. 6d. in the clerk of the peace's accounts, as if actually paid by him.

When McKay accepted, he alleged that he knew nothing of this sum having been charged against the district, and accepted on the supposition that he should be allowed to retain the amount, as district funds came to his hands.

*Per Cur.*—It is clear the defendant cannot be charged as acceptor of this bill, because it had already been accepted by the drawee. To make him liable as for money received for Spalding's use, it must be shewn that he did receive money which he could and ought to have applied to paying this acceptance.

We do not see on what footing the plaintiff can recover against him. Watson's conditional acceptance became absolute when he received funds, which it is clear he did, and there is no doubt about the remedy against his administrator.

But the defendant is not liable as a party to the bill, upon his acceptance: he is not sued as a guarantee; and certainly he holds no money to the use of the plaintiff; that is, not in his individual capacity, in which capacity alone he is sued, and not as administrator of Watson. He has, as treasurer, merely received the public funds of the district, for the purpose of applying them to pay public charges.

The district has already paid this sum on account of the clerk of the peace to Watson, their former treasurer, and how can it be said that the same sum has passed into his hands



to be applied a second time to Spalding? There is no direction of such assessment, express or implied. The district funds have once paid this money, and Spalding can have no legal claim upon them, either direct or indirect, through the treasurer. If the justices of the district had placed the specific sum in the hands of Watson to answer his acceptance, and he had misapplied it, we do not see how an action for money had and received could result from that against the subsequent treasurer, merely because the revenue of the district came afterwards into his possession. It may be possible that if this defendant had been aware, as he might have been upon examination, that Watson had in fact not paid this bill, he might have been able to recover it for the district out of the estate of Watson, provided Watson's estate was solvent. But we do not feel authorized in assuming that Watson's estate had assets beyond the amount of the balance which was actually paid over—that is, the £359. Indeed, the defendant on his oath declares that he, as Watson's surety, had to pay a considerable part of the balance to the district, exclusive of this.

When the plaintiff, having an ordinary claim upon Read as his debtor, takes a bill upon Watson, and procures his acceptance, he has that double remedy against the acceptor and drawer which others have in similar cases; and if upon Watson's failure to pay he took no legal remedy against the drawer and lost it by laches, we do not see how in equity any right of action results to him against this defendant, nor how it could result upon any other legal ground, than his having received money which he could have so applied.

We are of opinion there should be a new trial on payment of costs.

Rule absolute.

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### STREET V. HAMILTON.

*Trespass—Execution—Chattel mortgage.*

An action for trespass will not lie against a sheriff for seizing goods which were subject to a chattel mortgage, but of which the mortgagors had possession.

This was an action of trespass: the defendant pleaded the general issue.



The plaintiff took a bill of sale of Hay and Gray of an engine and other stock in trade, at a foundry at Chippewa, to secure advances they had made, were making, and were to make, and he allowed them to remain in possession of the stock thus assigned, and of the land and premises, which were Street's. Then came execution creditors, and the sheriff sold the property (stock), and for this the plaintiff brought *trespass*.

The jury found that the bill of sale to the plaintiff was made *bonâ fide* to secure a subsisting debt, and that the sheriff seized under the executions while they were in force.

ROBINSON, C. J.—In *Dyce v. Pearson* (4 D. & R. 654), *Abbott, C. J.*, says: "I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world, not merely as having the possession of, but the property in the goods. \* \* \* It is certainly my opinion that if the real owner of the property suffers another to have possession of it, and to have those documents which are the muniments of title, *a sale by such a person shall bind the true owner.*"

Now here the jury have found, to be sure, that "the bill of sale to the plaintiff was made *bonâ fide* to secure a subsisting debt"—that is, they have negatived any fraudulent intent in taking the security; but the whole evidence shews that Hay and Gray were allowed to deal with this property as their own; that they had full power to sell, and were in the constant practice of selling as if it were their own; it is therefore, in truth, nothing more than an attempt to reserve a right of property to be exercised only in order to defeat a creditor whenever one appears; that, we think, is clearly illegal. It can never be held that the sheriff committed a trespass against this plaintiff by seizing goods as belonging to Hay and Gray of which they were in possession, with the power of disposing of them as owners.

If the plaintiff had a right to enter upon the possession of these goods when he pleased, he should have first exercised that right, and then the seizing would have been an injury to his possession.

The verdict for the defendant, we think, should stand.

Rule discharged.



## CARLISLE ET AL. V. THE NIAGARA DOCK COMPANY.

*Partnership—Contract.*

When a contract was made with one party, who subsequently admitted another person to a share in the contract, *Held*, that payment to the original contractor is sufficient, and that no notice need be taken of the subsequent co-partnership.

The defendant, it appeared, entered into a contract with Ellis (the second plaintiff) alone, for the performance of certain work; he afterwards allowed Carlisle, the other plaintiff, to join him in the job, and when it was finished Ellis and Carlisle disputed about their accounts, and each gave notice to the defendants not to pay the other. The defendants eventually paid Ellis, the person with whom they had contracted.

Upon the trial the jury were told that if there were a pre-existing partnership, and a joint contract, and the work done under it, and the payment was made to Ellis *malâ fide* and in fraud of Carlisle, then they were to find for the plaintiffs; but if there were no previous partnership—if the contract were with Ellis solely, and Carlisle was taken in afterwards, or if, owing to the disputes and cross notices, the defendants *bonâ fide* paid their money to Ellis, with whom they contracted, they should find for the defendants. The jury gave a verdict for the defendants.

*Per Cur.*—We see no good ground for disturbing the verdict. There is no pretence here that the money was not in fact paid to Ellis, and that there was any fraudulent collusion between the defendants and him, as in *Skaiffe et al. v. Jackson* (3 B. & C. 421.)

If he were a partner with Carlisle, and known to be so at the time of the contract, of course actual payment to him would have satisfied the debt, in the absence of any fraudulent intent with respect to the other partner (*Swan v. Steele*, 7 T. R. 213); because the general principle is, that the act or receipt of one partner binds the whole. But here there was no fraud in the defendants' declining to enter into the dispute between these two parties; they acted prudently and rightly in paying the person whom they employed. Moreover, it is not shewn that any partnership was known to the defendants, or existed even at the time of the contract.

Rule discharged.



## LARKIN V. WIARD.

*Renewal note not used as such—Liability of indorser thereon.*

A promissory note which had been intended as the renewal of another note, but which had not been so used, but had been left in the maker's hands with an indorser's name upon it, and was received by the plaintiff from the maker for a valuable consideration before it became due:—the indorser was held liable on such note.

The plaintiff sued, as indorsee, against the defendant as second indorser of a note for £125, dated the 8th of July, 1836, at ninety days, made by one McNaughten, and payable to one Gable, or order.

It seemed this note had been tendered for discount and rejected for want of another indorser; it was intended for a renewal; the word "renewal" had been written on the back and erased; and, before it was due, McNaughten (who since left the country) indorsed it over to the plaintiff for goods bought of him.

The plaintiff, being a *bonâ fide* indorsee for value, was allowed to recover.

The question was whether the note, being merely made for accommodation, and not accepted, could be recovered upon if afterwards dishonestly passed off by one of the parties?

*Per Cur.*—We think the plaintiff should recover, and that the verdict was right.

Judgment for the plaintiff.

## DOE DEM. CREEN V. FRIESMAN.

*Ejectment—Demand of possession—Action by grantee of the Crown against locatee.*

A person holding land under a license of occupation from the Crown is entitled to a demand of possession before ejectment brought by a grantee of the Crown in fee.

The plaintiff in this case made title, as Rector of Niagara, to certain land annexed by letters patent as an endowment to the rectory. He produced the patent constituting the rectory a parsonage, and also a patent presenting him to the living, and he proved induction by delivery of the key of the church, and the reading of the thirty-nine articles.

The defendant, on her part, shewed that in 1808 a license



of occupation of this lot (which was reserved as a glebe intended to be attached to the church at Niagara) was made by the Lieutenant Governor under his sign manual, by the advice of the Executive Council, to one John Kane to hold "during pleasure."

In this license of occupation, which was made to Kane and his assigns, a yearly rent of ten shillings was reserved, payable half yearly, in March and September. The license was assigned by Kane to one Markle, and by Markle to one Friesman, husband of the defendant, who had continued in possession as his widow.

The plaintiff had a verdict, with leave reserved to the defendant to enter a non-suit, upon the ground that the patent did not determine the tenancy at will under the license of occupation, and that the defendant was entitled to notice to quit.

During the trial the defendant also objected that induction was not sufficiently proved.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the necessity for notice, we think the person holding under the license of occupation would, in a case between individuals, be tenant from year to year, by reason of the reservation of a yearly rent, and that the words "during pleasure" could only have the effect of enabling the lessor to put an end to the tenancy at the expiration of any year by giving half a year's notice. It is not shewn that this defendant represents the estate by having administered to her husband, but being in possession she will be presumed to be rightfully there. Then no notice was proved, nor any demand of possession, and we conceive that the Rector was not relieved from giving whatever notice the tenant would be entitled to from the Crown, if no letters patent had issued; and this right is strengthened by shewing a receipt from the plaintiff, dated the 28th of February, 1833, for £1 10s. for rent since the year 1829, this being an acknowledgment, on the part of the lessor of the plaintiff, that the defendants' interest, as tenant under the Crown, was still continuing.



But, on the other hand, it is to be considered that when the defendant, at the trial, met the plaintiff's case by denying his title to possession, objecting to the sufficiency of his induction, she must be looked upon as disclaiming to hold under him and as standing upon a separate interest. We think, however, she has not compromised her right to a notice by taking such an objection, because she does not claim the right as being tenant to the lessor of this plaintiff, but as occupying under the Crown.—She may, we think, under such circumstances, say that she does not acknowledge, because she does not know, that the plaintiff as Rector represents this estate, but that at any rate, if he does, that she has then a right to look to him for notice before she can be regarded as a trespasser.

With respect to the proof of induction, we do not see in what particular the proof was defective; but it is immaterial to consider this, as the verdict must be set aside for want of proof of notice to quit, or even of a demand of possession, before the bringing of this action.

Licenses of occupation, such as that given in evidence here, we know to have been issued in very many cases from the earliest period of this colony, and though it is true that, to divest the Crown of an interest in lands, an act of record is on general principles necessary, yet in opposition to this general principle a usage has been recognized in England to make leases under the seal of the Exchequer, and the long possession enjoyed against the Crown, under this lease of the government, puts it out of the question, in our opinion, that she can be at once treated as a trespasser; and her occupation being upon a yearly rent, entitled her to six months' notice.

The case of *Harper v. Charlesworth* (4 B. & C., 574) seems to militate against the claim of this defendant to any notice or demand of possession; but there are strong points of difference between that case and the one before us, as respects the interest intended to be vested in the occupant, and the degree of formality with which the right was conferred. Here there is a formal writing under the signature of the Lieutenant Governor, purporting to be made by advice



of the Council; and we know that, under such instruments, valuable property has been in many instances here holden under the government, and expensive improvements made. Neither the statute 1 Anne, ch. 7. (upon which the whole stress is laid in the case in B. & C.), nor any of the statutory regulations and restrictions respecting the granting, leasing or managing of the crown lands in England, have ever been treated as in force here. They are, in the nature of things, wholly inapplicable to this province, and all that has been done by the government here and in the other colonies has been done without regard to them.

It cannot therefore, in our opinion, be said that this license of occupation is void under that statute. By the principles of the common law, nevertheless, it is insufficient, we conceive, to create a term; and we are not prepared to say that a six months' notice could be held necessary, though certainly, in justice and fairness, such a notice ought to be given. But considering the long occupation held under this written license from the Lieutenant Governor, the rent reserved and paid, and the notorious fact that such licenses have for a long series of years been in use and respected by the Crown, we cannot regard the defendant as a trespasser liable to be dispossessed, as if she were an intruder, without a previous demand of possession.

Rule absolute for a non-suit.

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### HAMILTON V. BOUEK.

#### *Seizure by sheriff—Abandonment.*

A chattel was seized by the sheriff and lent by him before the return of the writ. *Held*; no abandonment.

The question on the evidence was—was the seizure made by the sheriff of a mare of one Gisso, on an execution at the suit of one McFarland, abandoned? The sheriff seized her at Niagara in June, 1835, and then let Gisso take her again to St. Catharines to run a race.

It was not stated when the attempt to take her again took place. It was for resisting that attempt this action was brought. There was another question as to the legality of



the second seizure, there being no warrant from the sheriff to make the second seizure.

Leave was given to move for a nonsuit. The second attempt at seizure was a few days after, while the same writ was running.

*Per Cur.*—We think that the verdict for the plaintiff should stand. The first levy can hardly be said to be abandoned by lending the mare for ten days; and, at any rate, was there not a second seizure within the time the writ was running? We understand that the deputy sheriff was present on the second occasion, and if so the warrant is immaterial.

Rule discharged.

## MICHAELMAS TERM, 2 VICTORIA.

### EXECUTORS OF INNES V. BROWN.

#### *Executor—Money had and received.*

When money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors as money had and received to the use of the testator.

The particular facts of this case were stated in the case reported last term at page 650 of the present volume, upon the application for a new trial, and need not be again repeated. The verdict then was for the plaintiffs, and it was not set aside from a conviction in the minds of the court that it was against the justice of the case, but because it appeared to require further investigation, and principally because the pleadings had not been so framed as to suit the cause of action.

ROBINSON, C. J., delivered the judgment of the court.

Upon this occasion, the declaration having in the meantime been amended by adding special counts, the record is such as admits of a recovery according to the special circumstances stated to have occurred, if the facts should entitle the plaintiffs to recover.

- It is a hard case upon the losing party: the injury is wholly



occasioned by the insolvency of Bethune, which was unexpected by either party when this transaction occurred. One or the other must, in consequence, sustain the loss of the money which passed into Mr. Bethune's hands; and as to the consideration which of the parties can best bear the loss, it is one to which we can give no weight. It is our duty to say upon which of them the law throws the loss, and having ascertained that, we cannot avert the consequences, however much we may regret them.

Upon this second investigation, it stands as clearly proved as at first, that Bethune, having been before evidently engaged in some sort of agency for Brown, writes to him in September, 1833, that he thinks he shall be able to sell "his Wilder farm," and asks whether he shall take £500 for it *in cash*. Brown answers him, that considering what it has cost him, he ought to have more for it, but that he may take £500.

Taking these two notes together, it is evident that the authority is to sell for cash only at £500; and we may admit it to be the legal consequence of what passed between them, that Bethune's agency was such as authorised him to receive the money, though that is not the case upon a mere authority to sell. It follows, then, that if Mr. Bethune had sold for £500 in cash, and had received the money, his receipt would have acquitted Dr. Innes and been binding on Brown.

But he agreed with Innes to take bills on England at three and four months, and he received such bills in October, 1833, and remitted them to England, negotiating them through his own agent Bradbury in Montreal, who credited him with the amount conditionally; that is, depending on the bills being paid at maturity. Mr. Bethune, in his evidence given upon a commission, declares that he did very early acquaint Brown with the particulars of what he had done, and that he made no objection: he declares also that it was understood between him and Brown that the £500 currency, which he was to receive out of the proceeds of these bills as the price of the farm, was to be passed to Brown's credit in the accounts between them: that it



was so credited when he remitted the bills through Bradbury, and that it answered Mr. Brown's purpose, as so much cash, to stand against acceptances and liabilities which he (Bethune) about that time incurred on Brown's account, in the course of their dealing.

But this account of the matter seems to us to be utterly irreconcilable with the letter written by Bethune to Brown in April 1834, and produced in evidence on both trials, in which the agreement with Innes, the acceptance of bills instead of cash, and the money being unpaid up to that time, are all communicated to Brown as information that had not before been conveyed to him, and in which further it is distinctly stated that this transaction is wholly apart from the other business between them.

It is clear from the written documents that in April, 1834, Mr. Brown's right to have the £500 in hand before he conveyed the land, and that up to that time he had received nothing, is distinctly admitted.

There being this repugnance between the account now given by Mr. Bethune and his letters written at the time, if the jury thought it were safe and reasonable to trust to the written evidence, we cannot condemn their judgment. They have come, we think, to the right conclusion.

Then the case stands thus:—the executors of Innes sue Brown for not having made a title to this farm: the alleged agreement being to convey an interest in land, it is necessary under the Statute of Frauds, that the plaintiffs should shew an agreement in writing, signed by Brown, the party to be charged, or by his agent lawfully authorised. This agreement in writing we have taken to be supplied by the letter of Mr. Brown of the 14th of April 1833, taken in connection with Mr. Bethune's, to which it is an answer, and with the subsequent correspondence. Mr. Bethune says, "I think I can sell your Wilder farm; shall I take £500 for it in cash?" The defendant answers, "it is much less than I ought to get for it, but as times are turning out, *take* that sum, if you can do no better."

Giving to this written evidence the strongest construction in favor of the plaintiffs' action, we have viewed it as an



agreement on the part of Brown to sell to Dr. Innes (who it appears by letters afterwards written was the proposed purchaser) the Wilder lot for £500 in cash, and we conceive also from the language of the letters, that Mr. Bethune had not only authority to sell, but authority to receive the money.

In the month of April following (1834), while Innes was living, he applied to Mr. Bethune for his deed, who writes to Brown as if for the first time apprising him of the bargain he had made with Innes. "Dr. Innes," he says, "who purchased the Wilder farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid, I shall account to you for the amount—£500. This transaction is entirely out of our other business. I sent the bills to Scotland through Bradbury & Co., and the moment they advise payment, I can draw for the amount. If you will make a title to the land, leave it with Mr. Moffatt to be given up on your order."

Supposing Bethune to be Brown's agent, fully authorised to act for him in disposing of the farm, the above letter becomes evidence under the Statute of Frauds, so far as it supplies evidence of the agreement with Innes: and so also is the following letter which he wrote to a friend, Mr. Henry, on the following day, in order to raise the £500 to pay Brown, that he might get the title which Innes was pressing for. "Dear Robert,—Mr. Brown being very urgent for the money for the farm purchased of him for Dr. Innes, I have to request that if the order on you is accepted you may pay Mr. Brown £500, and I will give you a bill for the same. I forwarded Dr. Innes' bills to Scotland and did not negotiate them, they have been accepted, but I have as yet no account of the money." Upon this letter Mr. Henry writes an answer: "Should the within-mentioned letter of credit be accepted, I will retain the within-mentioned sum of £500, for Mr. Brown or order."

The letter from Brown to Bethune in September 1833, was a mere authority to make a certain contract which should bind Brown; it was in itself no contract. The agreement to charge Brown must be looked for, therefore, in these letters signed by Bethune under the authority of this letter



of September 1833. If they supply an intelligible minute of an agreement on the part of Brown, such agreement will bind Brown, provided it is within the scope of the authority given by the letter of September 1833.

They do, we think, prove clearly that he had agreed with Innes to accept from him £500 for the farm, and they import further, that, by the agreement, Brown was not expected to make a deed till he should get the money, because Mr. Bethune states in effect "this transaction is apart from other business; I do not pretend that it is incorporated in any way in our mutual dealings; you are to have the cash."

Then, taking the whole together, in April 1833, when the deed was demanded of Brown, Innes was entitled to say to him, 'give me a deed,' provided he could at the same time say 'I have paid you £500.' He does not then, however, apply to Brown, but he applies to Bethune, with whom alone he had had any communication about the property; and it is a remarkable and very material fact that it is proved that he repeatedly said that he would have nothing to do with Brown; that he looked to Bethune alone; and indeed Bethune in his letter to Henry says he wants £500 to pay Brown for the farm purchased *of him for Dr. Innes*, as if he had been selling it to Innes on his own account, without its being meant or understood that there should be any idea of a contract as between Innes and Brown. Then Bethune, being thus applied to, endeavours to get Brown to convey, by relating to him the bargain. Brown seems to have felt himself entitled to say 'it is all very well, I am bound to satisfy your bargain as far as regards the price, but where is the £500? I have nothing to do with Innes' bills which you tell me of.' Bethune's reply is, 'they are accepted and I have no doubt will be paid, and, in the meantime, you can execute a deed and place it in the hands of a third party, subject to your order.' This was acquiescing in what Brown contended for, that he was not bound by any agreement to convey the land till he had actually received the money, so that in this the principal and agent agree; and we think that in Dr. Innes' short note to Brown, transmitting Mr. Bethune's letter to Brown, which had been sent to him open for the purpose, there is strong ground for



inferring that Dr. Innes did not feel that he could justly contend for anything else.

We do not see that we can properly set aside this verdict.

Rule discharged.

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REGINA V. MAINWARING.

*Information—Costs as against the Crown.*

In an action in the nature of an information filed by the Attorney General, costs will not be allowed to the defendant against the crown.

Information by the Attorney General for the Queen, for goods smuggled, with the usual averment that one Baldwin, as collector, seized.

The case was to have been tried at the assizes for the Midland District, but the Attorney General, for some cause, did not proceed. The claimant moved for costs for not proceeding to trial pursuant to notice, and the question was whether the costs could be granted upon an information of this kind, not promoted by an informer but filed by the Attorney General but in the name of the Queen.

*Per Cur.*—In the case of Kemp et al. prosecuting *qui tam* v. Lastby et al. (Parker 92,) upon an information *in rem*, it was determined that there could not be judgment as in case of a non-suit, for that the statute 14 Geo. II. ch. 17, extended only to actions between party and party, which such an information was held not to be; and it is there remarked as a difference between an information and an action of debt *qui tam*, that upon such an information for the king and another, the proceedings subsequent to the information are in the name of the Attorney General.

When a common informer sues by information for the king and himself, although he cannot be non-suited, yet it appears that he may be made to pay the costs for not proceeding to trial—Manning's Exchequer Practice, 177.

But this is an information by the Attorney General in the name of the Queen only, and in such a case there can be no order for costs, for then they must in effect be paid for the Queen. The provision respecting costs to the claimant contained in the statute 6 Geo. I. ch. 41, extends only to proceedings by a common informer. It is expressly laid down



by Mr. Hullock in his treatise on costs, that the liability of a prosecutor of an information to pay costs for not going to trial must be understood to relate only to cases where the prosecution is carried on entirely at the instance of a private individual; for if the king's name be more than barely made use of, the general rule that the crown neither pays nor receives costs then attaches. Therefore, where in an information filed in the Attorney General's name for beating a custom-house officer the prosecutor had given notice of trial, and not countermanded it, the court refused to grant costs to the defendant.

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RICHARDSON ET AL. V. DANIELS ET AL.

*Bill—Presentment of, after date, before due.*

It is not necessary to present a bill of exchange, drawn payable after date, for acceptance before it be due; and where a bill is made payable at a particular place, presentment there for payment on the day it falls due is sufficient to charge the drawer, or to enable the person who took the bill to sue on his original cause of action.

The defendants were indebted to the plaintiffs on an account, and in part payment Patton, one of the defendants, gave the plaintiffs two bills for £15 each, drawn by him on Messrs. Patton and Co., Quebec, *payable at three months and six months after date*, at the office of the Commercial Bank in Perth.

The question was whether, in order to enable the plaintiffs to revert to their original cause of action upon their account, it was sufficient for them to shew that the bills were lying at the bank in Perth when due, and were not paid; or whether it was not incumbent upon them to have presented them either for acceptance or payment.

*Per Cur.*—It is clear that a bill payable at a certain time, which these are, need not be presented for acceptance, but may be held till due and then presented for payment.

It is also held that the statute 3 & 4 Anne, ch. 9, sec 7, does not, in such a case as the present, bind the person taking a bill in payment of a pre-existing debt to take any other than the due course—that is, respecting presentment for acceptance and payment.



In this case, therefore, as in general, these bills, being payable at a particular time, required not to be presented for acceptance, but for payment only when due.

It is next to be considered that a bill or note, made payable at a particular place, must be presented at that place, and need not be presented to the drawer in person or at his residence.—*Sledman v. Gooch* (1 Esp. 3). The application of these two principles seems to make it unnecessary that any other course should have been taken with these bills than presenting them when due at the banking house at Perth, which was done here.

It is to be considered, on the other hand, that before the bank agent could pay bills drawn on Messrs. Patton & Co. at Quebec, they must have their instructions or consent for doing so, or they must see his acceptance on the bills.

As there was no presentment for acceptance here, they required to be in some other way advised; and the question is, whether it is the construction of the law that the drawer must be bound to advise them, so that they may be prepared to meet the bills at maturity at Perth, where they were made payable. We infer, from what is held in the cases cited, that it is thrown upon the drawer to do this, and that the payee does enough when he takes his bills to the bank at Perth and demands payment when they fall due.

The decision of this point is only necessary for determining on what terms a new trial shall be granted, for both parties desire a new trial; the defendants, because they contend that the plaintiffs could not legally recover the amount of these bills, which the jury have given them; and the plaintiffs, because they failed in recovering another demand, to which they maintain their evidence entitled them.

Rule absolute for a new trial, costs to abide the event.

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### BRIGGS V. BOWER.

*Partner—Non-joinder.*

In an action for goods sold and delivered, the non-joinder of a dormant partner is not fatal.

The plaintiff in this case moved for a new trial because part of his demand was improperly rejected, being for goods



sold to the defendant while one Hill was engaged with him, the plaintiff, in business as a dormant partner. They had been openly in partnership before this transaction, and a dissolution of the partnership had been publicly advertised; but Hill continued secretly a partner of the plaintiff, and part of the demand in this action was for goods sold and delivered to the defendant while Hill was thus secretly in partnership. The learned judge rejected this demand.

*Per Cur.*—It is clear that the plaintiff was entitled to recover upon it. A dormant partner is not necessarily to be included, though he is liable when discovered. Whether the non-joinder of a secret partner is held ill seems a somewhat doubtful point,—the Courts of King's Bench and Common Pleas having decided differently; but, upon the authority of the cases decided in the King's Bench, we are bound to hold that the plaintiff should have been allowed to recover in this case for the whole demand.

Rule absolute.

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### RICHMOND ET AL. V. SEWELL.

#### *Pleading—Pleas in abatement.*

A plea in abatement must be filed within four days from demand.

The question in this case was whether the defendants must plead in abatement in four days, or have eight.

ROBINSON, C. J.—I think a plea in abatement must be filed within four days, and there is nothing in the statute, or in our rules, against it.

The statute is negative; “if after eight days from demand no plea be filed, then the plaintiff may sign judgment”—that does not give eight days to plead *all* pleas. Then our rules say that in all cases the defendant shall plead at the expiration of the demand of plea, which means that he shall have no general imparlance and that there need be no rule to plead; but when the eight days are out, then, if there be no plea, judgment may be signed. This is in accordance with the statute, but neither has the effect of relieving the



defendant from the necessity of pleading dilatory pleas sooner than the eight days, and according to the strict practice of the court. That the language of a general rule like ours is not to extend to dilatory pleas, but must be taken to refer to pleas in bar of the action, has been repeatedly decided in England, and here the uniform practice and general understanding of the profession has been that pleas in abatement must be filed in the four days inclusive, as in England.

SHERWOOD, J.—This is a question of practice, and the inquiry is, whether a defendant is entitled by the practice of the court to four or eight days to file a plea of abatement. The defendant contends that the provincial statute (2 Geo. IV., ch. 1., sec. 5.) allows eight days to file any kind of plea, after service of demand of plea. That part of the statute contains the following enactment, “that in all actions or suits where the defendant or defendants have appeared, the plaintiff or his attorney shall, after filing a declaration in the office from where the writ issued, and service of a copy thereof on the defendant, by a demand in writing call for a plea; and that, if after the expiration of eight days from the service of such demand, no plea be filed, it shall and may be lawful for the plaintiff to sign judgment in the cause.”

This act does not declare that the defendant shall have eight days after demand of plea to file any description of plea allowed by law, but the statute merely gives the plaintiff the right to sign judgment in case the defendant files no plea of any kind within that time. The statute does not alter the practice of the court with respect to dilatory pleas in express terms; and I think it must be presumed that the legislature did not intend to interfere with the established practice of the court as regards such pleas, because they are not favored either by the legislature or the court; the statute 4 Anne, ch. 16, sec. 11, requiring that they shall be verified by affidavit, and the practice of the court of King's Bench in England, which we have adopted, compelling the defendant to plead in abate-



ment within four days, both inclusive, after delivery of declaration, or notice thereof, when filed—1 T. R. 277; 5 T. R. 210.

In my opinion, therefore, the proper construction of the 2 Geo. IV. ch. 1, sec. 5, is to hold that it embraces all those pleas upon which the plaintiff may join issue, and go to trial on the merits of the case, but does not include any dilatory plea.

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DUNHAM V. POWELL ET AL.

*Assault—Joint liability of defendants.*

In an action for assault in which the verdict was against two defendants, it was held that the second defendant was liable for damages equally with the first, though the principal injury was caused by the latter.

This case stood over upon a doubt whether the defendant Fraser was properly chargeable with the damages (£100) which were given chiefly in respect to the injury committed by Powell, the other defendant, in cutting off part of the plaintiff's ear with a sword cane.

ROBINSON, C. J., delivered the judgment of the court.

I think, upon the facts as they appeared in evidence, that the case went rightly to the jury, and that both defendants are legally liable for the damages sustained by the act of the most culpable, as stated by *Lord Ellenborough* in *Brown v. Allan et al.* (4 Esp. N. P. C. 158.) Since the trial, I have doubted much whether the view then taken by me of the case was correct, but I now think that there is no ground for holding otherwise, and that the verdict should stand. I cannot say that the damages were excessive, because the injury certainly was very considerable, and it was inflicted with a sword cane, an unusual weapon, and without necessity. As to the provocation, that applied only in mitigation of damages. It was such as probably would have led to a small verdict, if the nature of the retaliation had not been so unusual.

The defence of *son assault demesne* was pleaded, but the plaintiff's witnesses proved the first assault upon the defendant, and no witnesses were called on the other side.



For reasons formerly given by us, we think the affidavits which have been filed present no ground for interfering. The defendants voluntarily forbore to call witnesses, and cannot now have another trial, upon shewing us what they might have proved.

As the facts stand in evidence, both defendants committed an assault in point of law, and no justification was shewn for either: indeed one only pleaded specially.

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DOE EX DEM. McMILLAN V. DUANE ET AL.

*Notice of trial.*

In an action defended by the crown, notice of trial was served on the Attorney-general, who had previously been raised to the bench. Held that such notice was a nullity.

This ejectment was defended on the part of the crown.

Mr. Jameson, late Attorney-general, was attorney for the defendants on the record. Before the last assizes he became Vice-Chancellor. The plaintiff's attorney proposed to his successor in the office of attorney general that he should take notice of trial, but he declined, alleging that he had not time before the assizes to communicate with the defendants and prepare for the defence: the plaintiff then served notice of trial upon the Vice-Chancellor, and contended that such notice was sufficient, as no other attorney had been appointed, and he was still the defendants' attorney on the record.

There being no person at the trial prepared to conduct the defence, the plaintiffs were allowed to be non-suited, for want of the defendants confessing leave, entry and ouster; and the defendants now moved to set aside the nonsuit and obtain a new trial, on the ground that notice of trial was not regularly served.

*Per Cur.*—We think the rule must be made absolute, and the only question is, whether the non-suit shall be set aside without costs on the ground of irregularity. We are of opinion that Mr. Jameson's appointment to be Vice-Chancellor determined the warrant as in a case of death,



and that a notice served afterwards upon him was in fact no notice. If the plaintiff, having knowledge of his promotion to be Vice-Chancellor, omitted to appoint another attorney, then we think the notice might have been served on the defendants in person.

The rule should be made absolute, but not with costs, because the present Attorney-general had notice of trial, in time to go to trial, but not having time did not accept—it was substituting a notice. *Bradley v. Breach*, 2 Keb. 275: “If an attorney dieth the plaintiff or defendant must be required to make a new attorney, unless any doth undertake the suit as attorney voluntarily for the plaintiff or defendant.”

Rule absolute, without costs.

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#### DRISCOLL v. HART.

*New trial—Costs.*

When a case has been called on and tried at Nisi Prius in the absence of the defendant's counsel, a new trial will be granted only on payment of costs.

In this case the cause was called on at Nisi Prius in its order, the defendant's counsel being at the time absent. The court refused a new trial unless on payment of costs, saying that the judge would most probably under those circumstances have allowed it to stand, if he had been led to suppose that a defence was intended. If the defendant's attorney or counsel had been present, as he should have been, there would have been no misapprehension. His absence should not throw costs upon the plaintiff, who had strictly a right to have his cause called on in its order.

Rule absolute for a new trial on payment of costs.

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#### JEFFERS V. MARKLAND.

*Trespass—Excessive damages.*

In an action of trespass *qu. cl. fr.*, the court will interfere when the damages are manifestly excessive.

Trespass *quare clausum fregit*. The defendant pleaded the general issue, and special pleas.

The recovery was confined to entering on certain premises after they were locked up and deserted by the plaintiff. The



verdict was for the plaintiff, and £75 damages. The plaintiff proved a parol demise by the year, with liberty to keep it longer than a year—paying the rent half-yearly. Three months after the first year was out, the defendant distrained for the year's rent—£12. All the furniture was sold, except some papers left in a basket. The plaintiff then locked up the house and left it. About three weeks after, the defendant with his servant went and got in at the window, and placed a family in possession.

ROBINSON, C. J.—I am of opinion that we should grant a new trial in this case. The tenant, according to the evidence of his son, (though perhaps not very conclusive) had a right to continue tenant after the year expired; he did so and held for about three months, but he did not pay the first year's rent. The landlord for that entered and distrained, and to make his rent was obliged to sell all the furniture that was in the house. The plaintiff then left the house locked up, and to all appearance abandoned it. The defendant repeatedly sent to desire him to remove some papers he had left there in a basket, but the plaintiff took no notice of the request: then the defendant, rather than let the premises continue untenanted, which is always injurious to a house, and seeing no chance of getting rent, enters the house, and for this the plaintiff sues in trespass and recovers £75, more than six years' rent of the house, which must have been an inconsiderable tenement: and as to the injury to the plaintiff, it seems quite unlikely that he contemplated returning to the house. If he had, he might perhaps have held for nine months, but then he must have paid the second year's rent.

The damages, I think, are most excessive for such a case. It is true that in actions of trespass the courts are reluctant to interfere on that account, but this applies rather to trespasses to the person, or such as involve injury to the feelings or character, and in which there can be scarcely said to be any rule for computation. But here the injury was to a right of possession, certainly not wanton or insulting—the damages if any, might have been estimated, and the jury should not have disregarded all computation.



1 T. R. 277, and 5 T. R. 257, are cases where new trials have been granted in trespass for excessive damages—and they are trespasses to the person, and the latter a case which did not call for it so strongly as the present.

SHERWOOD, J.--The application in this case is for a new trial on the ground of the damages being excessive. The case was clearly made out on the part of the plaintiff. The evidence shews the defendant was the owner of a house in Kingston, and leased it to the plaintiff as tenant from year to year, at £12 a-year, payable half-yearly. Six pounds were due on the 13th of March last, and the defendant distrained the goods of the plaintiff found on the premises, and sold them for the rent. The plaintiff then shut up the house, leaving some manuscripts and other papers in it, and the defendant, about three weeks after the rent was collected, went to the house but finding the doors locked, opened a window and went into the house, and afterwards put another person in possession of it, against the will of the plaintiff. The defendant never gave the plaintiff any notice to quit. There is no evidence of any special damage other than the loss of papers, and the loss of the use of the house. The defendant had a legal right to the possession of the house upon giving six months' notice, before the end of the current year but not otherwise; the plaintiff was consequently deprived of the use of the house for nearly a year by the illegal act of the defendant. The damages of £75 appear to be large under the circumstances of the case, but still, I am not prepared to say they are excessive. In a case of trespass and entering into the house or lands of another, the jury are at liberty to estimate not only the pecuniary damages sustained by the plaintiff, but they may also consider the intention with which the act is done, whether for insult or for injury, or for both, and give their verdict accordingly.—2 Stark, 317.

I do not find sufficient cause to disturb the verdict, although I think it greater than it should be, according to my own view of the facts, but I think the jury were proper judges of the amount of damages.



## WILSON v. McCULLOUGH.

*Bail-bond—Form of condition—Action for escape—Against whom to be brought.*

An action for an escape will not lie when a valid bail-bond has been taken. Such action must be brought against the sheriff, and not against the bailiff, unless the act complained of amounts in effect to a rescue.

A bail-bond conditioned that the defendant shall enter special bail at the return of the writ, or surrender himself to the sheriff, is bad, though the first part of the condition alone would be good.

The plaintiff brought an action of assumpsit against one Fullerton, by suing out a bailable writ of *Ca. Re.*, directed to the sheriff of the district of Johnstown, who, at the request of the plaintiff, appointed the present defendant his special bailiff, to execute that writ, by a warrant in the usual form; and the defendant, under the authority of the warrant, arrested Fullerton, and took a bail-bond from him, with two sureties. The bond was to the sheriff, and was conditioned that Fullerton should enter "special bail at the return of the writ, or surrender himself to the sheriff." The defendant then allowed Fullerton to go at large, but no special bail was ever entered in the action; and this suit was commenced sometime after the writ against Fullerton was returnable.

At the trial a verdict was taken against the defendant, subject to the opinion of this court on two points, to the following effect—Firstly: Whether an action for escape could be sustained when a valid bond had been taken.—Secondly: If the bail-bond taken in the suit against Fullerton be void, would the defendant, as bailiff of the sheriff, be liable in this action?

SHERWOOD, J., delivered the judgment of the court.

With respect to the first objection, "that no action for escape can be sustained when a valid bail-bond has been taken," we think there is no doubt of the correctness of the position, according to the decision in 5 Taunt. 325. The question then is, whether the bail-bond, taken by the defendant in the name of the sheriff, is good in point of law.



The objection to the bond is, that it is not conditioned for the "appearance of Fullerton at the return of the writ," but for his "entering special bail at the return of the writ," or "surrendering himself to the sheriff."

The statute 23 Hen. VI. chap. 9. sec. 2, enacts that, "no sheriff, &c., shall take any obligation for any cause aforesaid, or by color of their office, but only to themselves, of any person, nor by any person who shall be in their ward by the course of the law, but by the venue of their office, and upon condition written, that the prisoners shall appear at the day and place contained in the writ, bill or warrant; and if any sheriff, &c. take any obligation in other form, by color of their office, it shall be void."

A defendant arrested on mesne process can in no way effect an appearance in the action, but by entering special bail. We therefore see no substantial difference between the condition of a bond, which requires the defendant to "appear" at the return of the writ and the condition of a bond which requires him to enter "special bail" at the return of the writ, and I am inclined to think they are the same in legal effect; and if the condition of the bond had stopped there, the obligation would have been valid; but it proceeds further, and allows Fullerton the election of entering special bail, or surrendering himself to the sheriff, at the return of the writ. This part of the condition is contrary to the words of the statute, and is also objectionable for uncertainty; for, although the sheriff may receive the defendant, if surrendered on or before the return day of the process, and cancel the bail-bond, still he is not bound by law to do so, and, consequently, is at liberty to refuse receiving him, if he thinks proper.

With respect to the second point—"If the bail-bond taken in the suit against Fullerton be void, still the defendant, as bailiff of the sheriff, is not liable in this action." There are some cases in the books which appear on first view to sustain the doctrine that the bailiff of the sheriff is equally liable to an action like this as the sheriff himself, but upon a more careful examination we think the rule will be found to be limited to such cases only as are clearly



in the nature of a rescue ; as when a bailiff, after arresting a defendant, should advise and actually assist him to escape. In such a case, he would be a wilful wrong-doer, and would come within the principle of the cases reported in 1 Leon. 146 ; 1 Salk. 18 and 441, and 12 Mod. 466.

In the present case the evidence shews that the defendant did everything which he had reason to suppose was necessary in the discharge of his duty, and to ensure the appearance of Fullerton at the return of the writ ; and therefore there can be no pretence for saying that he wilfully allowed Fullerton to make an escape.

We think that the current of authorities goes to establish the principle that the officer who is entitled by law to the return of the writ is the only person liable to be sued in an action like this. Bailiffs of franchises in England have the return of writs, and are liable to be sued for escape ; but an ordinary bailiff, like the defendant, we think, is never held liable to actions for escape like this. They are usually brought against the sheriff, who is bound to return the writ and state whether he has the body of the defendant or not.

In our opinion, actions for escape on mesne process should be brought against the sheriff, but not against his deputy, or bailiff, unless the act complained of should amount, in effect, to a rescue ; and the following cases, in addition to those already cited, go to sustain this principle—Cro. Car. 309 ; Com. Dig. " Escape in civil cases," B. ; 2 Mod. 32 ; 2 T. R. 5.

The verdict taken for the plaintiff should be set aside and a non-suit entered.

Rule absolute for a non-suit.



## ROSS ET AL. V. BALFOUR ET AL.

*Arrest—Affidavit to hold to bail—Irregularity in arrest—Special bail no estoppel—Endorsement.*

An affidavit of debt against the endorser of a promissory note or drawer of a bill of exchange, must state the default of the maker or acceptor.

Where a defendant puts in special bail to an alias bailable writ, he is not thereby prevented from objecting to any irregularity in the arrest.

*Quere*, whether an *alias* bailable writ need not be endorsed.

Where the objection taken to an affidavit to hold to bail was new in this court, and the plaintiff followed a form given in Tidd's appendix, the arrest was set aside without costs, and on condition that no action should be brought.

The plaintiffs were the endorsees of a promissory note, drawn by one Clark, in favor of one Charles Richardson, or order, and brought this action against the defendants as endorsers, by suing out a serviceable process, to which the defendants entered no appearance. The plaintiffs then took out a second writ, on an affidavit stating that the defendants, as the endorsers of the note, were indebted to the plaintiffs. Upon the latter writ the defendants were arrested.

The defendants in this case, after being arrested, caused a special bailpiece to be made out, which they delivered to the sheriff, who then allowed them to go at large. The defendants then applied to set aside the arrest on the following grounds. First: that the affidavit was insufficient, in not alleging that the maker of the note had refused payment. Secondly: that there was no written statement on the *alias writ* of the amount claimed by the plaintiffs for debt and costs, exclusive of the mileage, according to the rule of this court of Trinity Term, 3. & 4 Wm. IV.

SHERWOOD, J., delivered the judgment of the court.

The plaintiffs made a preliminary objection to the application of the defendants in this case, which must be disposed of before it becomes necessary to examine the merits of the defendants' motion.

The plaintiffs allege that the defendants have waived all right to object to the arrest, by causing a special bailpiece to be made out and delivered to the sheriff. We think they have not waived their right to object.

When the defendant in an action is arrested in the first



instance, he may give a bail-bond to the sheriff, conditioned to appear at the return of the writ, but the court have always held that the bail-bond is no waiver of any irregularity in the writ, or in the arrest. This rule is in favor of liberty, for if the defendants were obliged to lie in prison till they could apply to the court, which must be the case if it were to be that the giving of a bail-bond waived all objections to the previous proceedings of the plaintiff, it would occasion a great hardship on the defendant, without the semblance of justice. The objection to such a rule is equally strong when the defendant is arrested and held to bail after the commencement of the action by serviceable process, and therefore the like reason exists that it should not be allowed. The defendants in this action, in our opinion, therefore, are not too late in their objections, which we will now proceed to examine.

The first objection is, that the affidavit is insufficient in not alleging that the maker of the note had refused payment. By a rule of this court, passed in Hilary Term, 4 & 5 Geo. IV., it is ordered that, "In future the practice of this court, as well as the quantum of costs to be allowed in all proceedings, are to be governed (when not otherwise provided for), by the established practice of the Court of King's Bench in England."

The meaning of this rule, in our opinion, is, that the general practice of this court shall be regulated by the practice of the Court of King's Bench in England, unless otherwise regulated by acts of the legislature, or by rules of this court.

We think that the case of *Buckworth v. Levy* (7 Bing. 251), and the cases reported in 1 Dowl. P. C. 122 & 445, and 2 Dowl. P. C. 689, together with the printed forms of affidavits to hold to bail on bills of exchange and promissory notes found in the *Treatise of Chitty*, page 74, *a*, shew that the affidavit in this case does not conform to the practice of the King's Bench in England.

We think it is required by that practice, in an affidavit to hold the endorser of a bill of exchange or a promissory note to bail, to state in the one case that the drawer, and



in the other that the maker, has not paid. The reason for making such an allegation is given by *Tindal, C. J.*, in 7 Bing. 252, to the following effect :—

“ The drawer of a bill of exchange is not primarily liable to the holder, but only on failure of payment by the acceptor ; and, although the affidavit to hold to bail need not be framed with the precision of a declaration, enough should appear to shew that the obligation, which is not primary, has been incurred. There is nothing in the present affidavit which discloses that the defendants’ liability has been incurred.”

We think this principle is correct, and the practice here should be conformable to the English practice in this respect.

With regard to the second objection—that there is no statement on the writ of the amount claimed by the plaintiffs for debt and costs, we think, as the rule of court of Trinity Term, 3 & 4 Wm. IV. expressly requires such statement to be written on every bailable writ and warrant, that the omission of it is such an irregularity as renders the arrest void. This has already been decided more than once in this court, so far as regards the first writ sued out in any action, but we are not aware of any decision as respects an alias writ.

As the plaintiffs followed the form in Tidd’s appendix of an affidavit to hold the endorser of a promissory note to bail ; and as the objection to the affidavit raised a question which now comes before the court for the first time, we think the rule should be made absolute without costs, and upon condition that the defendants bring no action against the plaintiffs on account of the irregularities in the proceedings.

Rule absolute without costs.

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## GRIFFITHS V. WELLAND CANAL COMPANY.

*Welland Canal—4 Geo. IV., ch. 17.*

The Welland Canal Company have power, under their charter (4 Geo. IV., ch. 17, sec. 3). to let surplus water out of the canal in time of flood; and no action can be maintained for any damage done thereby if the act was necessary for the preservation of the canal.

The plaintiff sued, in this case, for damage done to his estate, by the Company letting surplus water out of the canal in a time of flood. A question was made whether the plaintiff could recover for any damage sustained more than six months before bringing his action. It was ruled at the trial that he could not, and the verdict was accordingly confined to an injury received upon a certain occasion within six months, when the company found it necessary to let off the surplus water from the canal, into the valley of the Ten mile Creek.

ROBINSON, C. J.—We have already given our opinion that the recovery was rightly restricted, according to the 38th section of the act 4 Geo. IV., ch. 17—and that such an injury was proved to have been committed within six months, as supported the verdict.

It next was made a question whether the letting off the surplus water, after the canal was completed and in use, was an act which the company were protected by the statute in doing; for it was insisted upon, that their powers were confined to the doing such things as were necessary for making the canal, or for repairing it; but, in our opinion, it admits of no doubt that the third section of the statute 4 Geo. IV., ch. 17, clearly extends to it; for it gives authority to do all things necessary for preserving, or using the canal, as well as for making and improving. And we are further of opinion, which is the principal point raised in this case, that for anything that may be thus done in strict pursuance of the power of the statute, no action can be maintained, for the statute makes it legal, and is a perfect defence under the general issue. It has been contended that the statute does not give a recompence, through arbitrators, for this kind



of injury, and that it follows, as a consequence, that an action must lie, or the party injured would be without redress.

I am not prepared to say that the 3rd & 7th clauses of the statute, taken together, do not, by a fair construction, allow of a remedy by arbitration for this species of injury. The Legislature seem to have apprehended that the law was, in that respect, defective; and the statute 1 Vic. ch. 27, has been passed expressly to remedy this supposed defect. But it cannot serve the purpose of the plaintiff in this action, to make it out that this case is not one for which a reference can be made to arbitrators, because the only consequence must be that he would be without redress in any shape; for the statute makes the act legal, and no action can therefore be maintained for it. There must therefore be a new trial without costs.

McLEAN, J.—The act incorporating the Welland Canal Company (4 Geo. IV., ch. 17, sec. 3), gives to the Company sufficient power to enter upon the lands, &c., of individuals and to make a canal; and the latter part of the clause gives them power to construct, make and do all other matters and things which they shall think necessary and convenient for the making, effecting, *preserving*, improving, completing and using the canal, doing as little damage as may be, and making satisfaction in manner in that act specified. It is clear that the Company has power then to let off the surplus water by the Ten mile Creek or any other outlet, if it be necessary to do so to *preserve* the canal, doing, of course, as little damage as may be, according to the terms of the act. It is shewn that the Company let off the water at a time when it was necessary to preserve the canal; and having only exercised a power given to them by the act, it does not appear to me that the verdict against them ought to stand.

As to the objection taken, that there was no proof of any offer to arbitrate, I cannot find that it is entitled to much weight as a ground for a new trial; for though the seventh section of the Welland Canal Act provides for arbitration



in case of disagreements as to damages in consequence of the canal, or anything connected with it, being cut and constructed upon the lands of individuals, I do not find in it or in any subsequent act any provision for referring claims of this nature to arbitration ; but, under any circumstances, I cannot see how any action can be sustained against the company for doing an act which they are authorised to do by the act of the legislature.

Rule absolute for a new trial.

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LEAHY V. McFARLANE ET AL.

*Prisoner—Discharge.*

In a case where two defendants were in custody on a joint execution, and the plaintiff having come to an arrangement with one defendant, discharged him :

*Held*, that the discharge of one defendant operated as a discharge of the other.

Motion to discharge Hill, one of the defendants, out of custody of the sheriff, the other defendant having been discharged on making an arrangement with the plaintiff.

*Per Cur.*—The case of *Clarke v. Clement and English*, (6 T. R. 525) is very similar to the present. English, one of the defendants, was arrested and discharged by the plaintiffs on a *Ca. Sa.*, upon his undertaking to surrender himself on a particular day if he did not pay the debt—Clement moved to quash the *Ca. Sa.* against him, and, after argument, it was decided, and the judgment given by Lord Kenyon, that as the plaintiff had suffered the other defendant to be discharged out of custody, he could not afterwards take Clement, the execution being a joint one.

The execution in this case is against one, and a discharge of one defendant must operate as a discharge of both. Had one of the defendants been discharged by operation of law the other might still be held, but this being by the act of the plaintiff, both are entitled to be discharged.

Rule absolute.

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## MCBEAN V. WILLIAMS.

*Slander—Proof.*

Where the words charged were "you robbed the mail;" and those proved, "I am not like you—running about the country with forged deeds, and robbing the mail, as you did:"  
*Held*, that the variance was fatal.

This was an action of slander. The words charged were—"You robbed the mail."

The words proved were—"I am not like you—running about the country with forged deeds, and robbing the mail, as you did."

The case was tried before *Robinson, C. J.*, at Cornwall. It seemed to the learned judge to be very doubtful whether the evidence sustained the declaration; but he recommended the jury to assess damages for the plaintiff, and leave it to the defendant to move against the verdict, if the direction was wrong. They found a verdict for plaintiff and £10 damages.

ROBINSON, C. J., delivered the judgment of the court.

There are few points in our laws in which one finds it more difficult to come to a satisfactory conclusion upon the authorities than upon the sufficiency of the proof of words laid in an action of slander. The cases are very contradictory. The general principle as now laid down is, that all the actionable words need not be proved; but that such as are proved must be proved as laid; that words merely equivalent will not do; and that whatever tends to qualify or explain the words relied upon must not be omitted.

Phillips, in his treatise on Evidence, thus states the law on this point; "The words must be proved as stated in the declaration; not that the whole of the words alleged in the record must be proved, but some material part of them, and damages may be given for such of the actionable words as are proved, precisely as in other actions the plaintiff recovers to the extent of his proof. But those words which are proved must be proved as laid, and it will not be sufficient to prove equivalent words of slander. Words to the same effect are not the same words. The rule is, that



though the plaintiff need not prove all the words in the record, yet he must prove so much of them as will be sufficient to sustain his cause of action; and most clearly it is not enough for him to prove equivalent words of slander."—Phillips' Ev. Def. 97.

This is probably too strictly expressed, as it would seem to allow of no latitude, and to bind the plaintiff to the exact words; but the case referred to—Maitland v. Goldney (2 East 434)—goes far to support Mr. Phillips in the doctrine as he lays it down.

Now in the case before us the defendant is charged with saying to the plaintiff, "You robbed the mail," which is specific, and may be taken to charge him deliberately with some one act of robbery. The proof is that he said, "I am not like you—running about the country with forged deeds and robbing the mail, as you did."

These words impute a habit of crime, which some may think a more serious charge than the one charged, and others less so, as tending more to vague and general crimination. We cannot say that they are in our opinion equivalent; and if they were, there is strong modern authority (2 East 434) for saying that that will not do. It is not possible, we think, to reconcile even all the modern cases in this point, but we have found none that seem to sustain the plaintiff's evidence in this case.

#### BIDWELL, EXECUTOR OF BIDWELL, v. McLEAN ET AL.

*Pleading—Sheriff—Non-return of writ.*

In an action against a sheriff and his sureties, on their covenant for the due performance of his duty, for not returning a writ of *Fi. Fa.*, and the money made thereon, it is necessary to set out the recovery of the judgment which warrants the issuing of the writ.

This was an action of covenant, grounded on the second section of the provincial statute 3 Wm. IV. cap. 9, which enacted in substance that the sheriff of each district in the province should provide sureties, who, together with himself, should enter into a covenant to pay over to the person entitled to the same such sums of money as he might receive



from time to time by virtue of his office of sheriff; which covenant might be sued upon by any person suffering damages by the default or wilful misconduct of the sheriff. The plaintiff alleged that John McLean, who was then sheriff of the Midland district, together with the other two defendants, executed a deed of covenant in the form stated in the schedule of the act, marked B.; and that afterwards, on the 16th day of January, 1836, the plaintiff, as executor, sued out of this court a writ of *fieri facias* against the lands of one Jonathan Fairfield, directed to the sheriff of the Midland district, the defendant John McLean, upon which writ the sheriff was commanded to make the sum of £103 16s. 8d., which the plaintiff, as executor, had recovered against the said Fairfield; and that the said sheriff should have that money in this court, to be rendered to the plaintiff on the first day of Hilary Term 1837, together with the writ: that the writ was endorsed to levy the sum of £44 1s. 8d., besides sheriff's fees: that the writ so indorsed was delivered to the defendant, then being sheriff, on the 19th day of January, 1836; and that he levied the amount of the sum due, but had never paid the money to the plaintiff, nor returned the same into court, according to the exigency of the writ.

To this declaration the defendants filed a general demurrer, and the plaintiff joined in demurrer. The objection to the declaration was, that the plaintiff had not set out a final judgment in this court to warrant the issuing of the writ of *Fi. Fa.* in his favor; and the question was, whether it should appear by the declaration that the plaintiff had recovered a judgment against Fairfield.

*Per Cur.*—The statute 3 Wm. IV. c. 9, sec. 2, upon which this action is brought, enacts in substance that the sheriff and his sureties shall be liable on their covenant, given under the provisions of that act, for all damages sustained by any person in consequence of the default or wilful misconduct of any sheriff. Although this is an action of covenant, still the default of the sheriff in returning the writ and the money into court is, in truth, the wrong complained of, and for which a redress is sought by the plaintiff.



By the statute West. 2, 13 Edw. III. cap. 11, the action of debt is given against the sheriff for escape of a prisoner in execution; but it has been determined that by the equity of that statute the plaintiff may bring an action on the case or an action of debt at his election—Cro. Jac. 288.

The judgment against the party escaping must always be stated in an action against the sheriff for an escape.—1 Taunt. 27; 8 B. & C. 128.

If the judgment on the writ of execution be void in law, the sheriff may take advantage of that fact by pleading—(Bul. N. P. 65-6; Cro. Jac. 288)—and he will not be liable.

Upon reflection, we see no difference in a case like the present, for the declaration certainly supposes a wilful or negligent default on the part of the sheriff in returning the writ and the money levied on it into court; and we therefore think that judgment must be given for the defendants on this demurrer.

Judgment for the defendants on demurrer.

#### JUDGE V. JUDGE.

*Arbitration and award—Declaration averring award made on day appointed—  
Plea, no award—Replication varying from declaration as to time.*

When to a declaration in debt on a submission bond, with an averment that the award was made on the day appointed, the defendant pleaded “no award,” and the plaintiff replied an award within the time—to wit, on a day and year different from the year stated in the declaration—the replication was held sufficient on general, though it would have been bad on special, demurrer.

Plaintiff sued in debt on an award.

1st count on the submission bond.

2nd, on the award setting forth submission by bond, with condition that award should be made on or before the 25th of May, 1837, and an award made 23rd of May, 1837.

The defendant pleaded to the second count that the said arbitrators did not, on or before the said 25th of May mentioned in the said condition, make any award in writing under their hands and seals of and concerning the premises in the said condition mentioned, and so referred as afore-



said, ready to be delivered to the said parties in difference ; and this, &c.

The plaintiff replied that the arbitrators, within the time limited—viz., on the 23rd of May, 1827—did make their award, &c. To this the defendant demurred generally, and he relied upon the departure,—the award declared upon being said to be made on the 25th of May, 1837, and the award set out in the replication being stated to be made on the 23rd of May, 1827, which, moreover, was before the submission.

ROBINSON, C. J.—I think, on a more deliberate consideration of the authorities, that the day named in the replication may probably be rejected as surplusage. There now remains the allegation that the award was made after the submission and within the time limited. And as to the departure, we think the cases cited tend to show that when the day is not named, as the *date* of the instrument, there is no departure ; and being rejected, it leaves the time consistent with the declaration.

SHERWOOD, J.—It is evident, at first sight, that the plaintiff has made a mistake in stating the year 1827 instead of the year 1837 in his replication to the defendant's second plea to the second count ; but I think the words "in the year of our Lord one thousand eight hundred and twenty-seven" may be rejected as surplusage, and the replication will be good without them.

The objection would be fatal on special demurrer, but the statute 4 Anne, cap. 16, renders it unavailing on general demurrer.

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## HILARY TERM, 2 VICTORIA.

## DICKSON V. JARVIS.

*Evidence—Agent—Statute of Limitations—Case for fraudulent misrepresentation  
—When statute begins to run.*

A document executed by an agent in the name of his principal can be proved by the same evidence which would be sufficient to prove its execution by the principal.

In case for fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damage accrued.

This was an action on the case in the nature of a *deceit*. The defendant pleaded the general issue and the Statute of Limitations, and on the trial of the cause a verdict was taken for the plaintiff, with leave for the defendant to move the court to enter a nonsuit on several objections taken by the counsel for the defendant, which were—

1st. That the written agreement, signed by the defendant as the attorney of William Johnson, was not sufficiently proved to entitle the plaintiff to read it.

2nd. That there was a material variance between the record and the agreement adduced in evidence in the name of William Johnson.

3rd. That the action was barred by the Statute of Limitations.

SHERWOOD, J.—With respect to the first objection, there were two subscribing witnesses to the agreement made by the defendant in the name of Johnson, one of whom was proved to be dead and the other out of the province. The handwriting of both of the witnesses was proved. The plaintiff then requested that the agreement might be read. The defendant contended that it was not sufficiently proved, and that it was necessary to prove his handwriting, because his name did not appear in the body of the instrument, but merely in the signature at the bottom, and not as principal, but as agent or attorney of Johnson. I overruled this objection at the trial, and I still think there is nothing in it. The evidence was sufficient to prove the execution of the agreement if it had been executed by the principal himself,



and I can discover no reason why it should not be when executed by his agent. To render the execution complete, it was requisite for the agent to subscribe his own name as well as that of his principal, and the subscribing witnesses who saw him write it could have proved the fact if they had been present in court. That, however, was impossible as regarded one of them, who was dead, and the other, being out of the province, was of course beyond the jurisdiction of this court. Under such circumstances, it appears to me that secondary evidence was as properly admitted as if the principal had executed the agreement in person.

With regard to the second objection, it was obviated at the trial by allowing the record to be amended conformably to the agreement.

The last objection—namely, “that the action is barred by the Statute of Limitations”—remains to be considered. It appeared by the evidence that one William Johnson, who resides in England, was the owner of a tract of land in the 9th concession of Grantham, in the district of Niagara; and the defendant, as his attorney and agent, made a written agreement, more than six years before the commencement of this action, for the sale of the land in fee to the defendant, in the name and on behalf of William Johnson, the owner. When the agreement was made, the defendant had no authority either to make a bargain for the sale of the land, or to execute the agreement in the character of Johnson’s attorney; and Johnson afterwards, and within six years before the bringing of this action, wholly refused to recognize any authority in the defendant to act for him, and also refused to confirm the agreement. In the interim between the making of the agreement and the refusal of Johnson to confirm it, the plaintiff, relying on the contract, had made very considerable improvements on the land, and, at length, before the bringing of the present suit, he was formally dispossessed of the premises in an action of ejectment at the suit of Johnson, and subjected to much inconvenience and expense. On the argument in banc. it was contended by the plaintiff that the Statute of Limitations did not apply to this case, because the repudiation of the contract by



Johnson, and his disclaimer of the pretended authority of the defendant to act as his agent, do, as his counsel alleged, form the cause of action, and that all the damages sustained by the plaintiff resulted from that cause. On the other hand, the defendant insisted that the cause of action set out on the record in this case is the alleged act of making the agreement therein mentioned in the name of Johnson, and as his attorney and agent, without possessing any legal authority to warrant that act.

It was admitted by the counsel for the plaintiff that the defendant had not been guilty of any fraud in fact by resorting to any deceitful practice to prevent the plaintiff from making inquiries of Johnson respecting the defendant's authority to act as his attorney and agent in making the agreement with the plaintiff, as stated in his declaration, or in any other manner. The plaintiff's counsel contended that the law would imply fraud, from the nature of the whole transaction, sufficient to sustain his case, and that it was not indispensably necessary in an action like this to prove actual fraud.

The first question then, is, which of the two alleged causes is the legal cause of this suit? To solve this question the declaration must be examined. It consists of six counts, but the gist of the action is precisely the same in all. The fifth and sixth counts set out the cause of action in a more particular and circumstantial manner than the others, without shifting the ground of action or changing the nature of the grievance. I will therefore endeavor briefly to analyze the first count, which will be sufficient to give a correct view of the substantial part of the entire declaration. It alleges that the plaintiff was desirous of purchasing the land in question, which belonged to one Johnson; that the defendant, well knowing that fact, did falsely, fraudulently, and deceitfully represent and pretend that he was duly authorized by Johnson to bargain and sell the land to the plaintiff as the attorney and agent of Johnson, and did falsely and fraudulently pretend, by an agreement in writing, purporting to be made between Johnson, by the defendant acting as his attorney and agent, and the



plaintiff, to sell the land to the plaintiff for £500, £400 of which sum the plaintiff was to pay the defendant in hand, and the remainder by instalments in the course of three years; that the plaintiff, relying upon this false and pretended sale, and believing the defendant had authority from Johnson to act as his attorney and agent in making the agreement, paid the defendant £400 in part execution of the contract, took possession of the land under it, and made improvements to the value of £1,000; that afterwards Johnson brought an action of ejectment against him to regain the possession of the land, which action the plaintiff, in the first instance, defended at the request of the defendant; but, shortly before the trial was to have come on, the defendant confessed to the plaintiff that he had sold the land and made the agreement without any legal authority from Johnson; that the plaintiff was ultimately turned out of the possession of the land, and lost his improvements and the expenses occasioned by the action of ejectment.

At the trial of the cause it was proved that the defendant went with the plaintiff, after the agreement was made, and put him in possession of the premises, as the agent and attorney of Johnson under the agreement. This count clearly charges the defendant with asserting an authority which he knew he did not possess; with receiving £400 from the plaintiff in consequence of such false representation, and with causing the plaintiff to take possession of the land under a void agreement, and to make improvements on it to the value of £1,000. These facts are stated to have occurred more than six years before the commencement of the present action, and they appear to me to form a complete cause of action, and to have been sufficient in law to entitle the plaintiff to damages had he brought his action in time. What follows in the same count took place within six years before the bringing of this suit, but clearly forms no new cause of action, but only shews a part of the damages which resulted from the original cause of action, and would most probably have the effect, when joined with the preceding facts, of augmenting the amount of any verdict which might be given. It is, "tha



Johnson brought an action of ejectment against the plaintiff, and that he at first defended the action at the request of the defendant, but that shortly before the trial of that action the defendant confessed he had no authority to sell the land; that the plaintiff was turned out of possession by Johnson, and lost the value of the improvements and all the expenses occasioned by the proceedings in the ejectment against him." The only act which is imputed to the defendant in the latter part of the count is not an act of misconduct, but an act of honesty by fairly admitting his fault, and therefore could not be a ground of action in the nature of deceit. The refusal of Johnson to confirm a contract which he never authorized would neither lessen nor aggravate the original misconduct of the defendant in making it without authority; the loss of the possession, the value of the improvements, and the expenses of defending the action of ejectment, are parts of the damages which the misconduct of the defendant occasioned in making the agreement, receiving the £400, and giving the possession of the land, in the name and on behalf of Johnson, without authority.

The plaintiff was guilty of *laches* in neglecting to inquire into the authority of the defendant for more than six years. The maxim of "*caveat emptor*" is peculiarly applicable to the sale of real estates. If the purchaser makes an agreement with a person professing to be the authorized agent of the owner, and wholly neglects for such a length of time to examine into the nature of the agent's authority, he must suffer the consequences, unless he can shew that he has been prevented by the fraud of the pretended agent from making the necessary inquiries. Here nothing of the kind is alleged. The case of *Granger v. George* (5 B. & C. 149) is an authority on this point. In that case it was held that the Statute of Limitations is a clear bar to an action of trover commenced more than six years after the conversion, although the plaintiff was altogether ignorant of the conversion till within six years, it not appearing that the defendant practised any fraud to prevent the plaintiff from obtaining that knowledge at an earlier period.



There was no fraud in fact imputed to the defendant in this case, either at the trial or in the argument on the rule *nisi* for entering a nonsuit; but the counsel for the plaintiff, in both instances, rested his case on the implied fraud, and on the principle advanced and explained in the case of *Foster v. Charles et al.* (7 Bing. 105) by Chief Justice *Tindall*, who said, "it is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences; it cannot be material what the motive was—the law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." The ordinary rule as to the Statute of Limitations is not at all varied or qualified, therefore, by any incidental fraud in the conduct of the defendant in this action, because none was alleged or proved.

It has been attempted to liken this case to the case of *Roberts v. Read et al.* (16 East 215), where the whole cause of action was the consequential damage. The original act was not itself actionable. The defendants were surveyors of highways, and caused the soil of the highway to be dug up for the improvement of the road near the garden wall of the plaintiff, in May 1810, which was continued in the same state till January 1811, and then it occasioned the foundation of the wall to give way, and the wall fell down. The statute 13 Geo. III. enacted "that if any action was brought for *anything done or acted* in pursuance of that act, it should be brought within three calendar months after the fact committed, and *not afterwards*." Lord *Ellenborough* said, "It is sufficient that the action was brought within three months after the wall fell, for that is the *gravamen*; the consequential damage is the cause of action."

The act of digging up the soil in the highway was not considered there as the grievance or cause of complaint, but the fact of the falling of the wall in consequence of the removal of the soil.

The present case is analogous to the case of *Howell v.*



Young, reported in 5 B. & C. 259. The declaration there stated that the plaintiff contracted with A. B. to lend him the sum of £3,000 at interest, the repayment to be secured by a warrant of attorney and certain mortgages of freehold property, provided they should be found to be a sufficient security for that purpose; that the plaintiff retained the defendant as attorney to ascertain whether they would be a sufficient security or not; that the defendant accepted the retainer; and that it became his duty to use due care and diligence to ascertain whether the warrant of attorney and mortgages would be a sufficient security for the repayment of the £3,000 and the interest. The declaration then set out a breach, that the defendant did not use due care and diligence, but wholly neglected to do so, and, on the contrary, falsely and deceitfully represented to the plaintiff that the warrant of attorney and mortgages would be a good security; whereupon the plaintiff lent the £3,000 to A. B.; but that the security was insufficient, by reason of which he had lost the interest on the money lent, and was likely to lose the principal sum of £3,000. The defendant pleaded—1st, the general issue; 2ndly, that the cause of action did not accrue within six years.

It appeared by the evidence given at the trial that the plaintiff had retained the defendant as his attorney, for the purpose stated in the declaration, in 1814, and at that time he represented to the plaintiff that the security was sufficient. In the year 1820, it was discovered the security was not good. The learned judge at the trial directed the jury to find for the plaintiff if they were of opinion that the plaintiff had been induced by the fraud of the defendant to advance the money, otherwise for the defendant. The jury found a verdict for the defendant, and a rule *nisi* for a new trial was obtained in the following term on two grounds—1st, that upon the question of fraud the verdict was against the weight of evidence; 2ndly, that in such an action the Statute of Limitations runs, not from the time the insufficient security was given, but from the time the special damage alleged in the declaration—namely, the loss of interest—accrued.



The court held that the misconduct of the attorney in making the false representation to the plaintiff constituted the cause of action, and that the Statute of Limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time it was discovered the security was bad.

In the present case, I think the Statute of Limitations also began to run from the time the defendant was guilty of misconduct in representing himself to be the attorney and agent of Johnson, and making an agreement in his name with the plaintiff without legal authority, and not from the time the plaintiff discovered he had no authority, by the refusal of Johnson to confirm the agreement, nor from the time he sustained special damage by the loss of his improvements and the expense of defending the action of ejectment.

The second plea of the defendant is sustained by the evidence, and therefore a nonsuit must be entered.

MACAULAY, J.—The question is not raised whether an agent acting without authority may be treated as a principal, but it is assumed to be a fraud on the other party. Considered in relation to the Statute of Limitations, “the only question in this case is when the cause of action accrued, for the statute then attached” (3 B. & Adol. 295). The issue upon the record is, whether the *cause of action stated in the declaration* accrued within six years (3 B. & Adol. 631)—and it appears to me that the cause of action, as laid, accrued from the time of the alleged false, fraudulent and deceitful conduct of the defendant, and not from the time of its discovery by the plaintiff. Upon the principle of fraud, the plaintiff would be at liberty to repudiate the transaction whenever he discovered it, whether the next day, or at any future period within six years; without waiting to learn the disposition of the defendant’s alleged principal. I at first thought the plaintiff bound by his contract, although Johnson was not so bound until adoption, and that, in the interim, the plaintiff could not recede; but, even regarded in this light, I do not



see that any action on the case, as for a wrongful act in the defendant, would accrue at any period in point of time other than at the inception of the agreement; and the Statute of Limitations relates to the original wrongful act, unless something *ex post facto* occur, in itself creating a new cause of action. But the fraud, deceit, or misconduct are the gist of the action, and the special damage is stated merely as a measure of damages resulting from that cause of action—3 B. & Adol. 293, 5 B. & C. 263-4, 266-7, and the only *mala fides* complained of was in the beginning; and if the defendant's conduct was such as to give the plaintiff a right of action such as is now brought upon general issues, repudiating his act and agency, I should think it would equally lie before his decision was known, if in the meantime the plaintiff discovered the want of authority, and such want constituted an imposition upon him legally characterized as knowingly false, fraudulent, and deceitful.

The want of knowledge in the plaintiff would not seem to make any difference—3 B. & Adol. 626, 2 B. & B. 73, 5 B. & C. 152; and if it did, if want of knowledge or the discovery of fraud would take the case out of the statute, it should be replied specially. The issue joined relates to the period when an action in point of law first accrued—3 B. & Adol. 631, 2 B. & B. 73, 4 Moore, 508. But the detection of fraud, or after-acquired knowledge of new facts, does not seem to affect the application of the statute in courts of law, whatever may be the rule in courts of equity—Prov. Stat. 1834, ch. 1, sec. 34, which I had in my mind at the argument—3 Bligh, 2; 1 Bligh, 315; 3 D. & R. 322; 2 B. & C. 149; 2 Doug. 654.

The case seems to range itself under the cases above cited, and not those contained in 16 East 215, 1 C. & P. 541, 1 R. & M. 161.

Rule absolute.



## BRADBURY V. OLIVER.

*Bill of exchange—Parol evidence to alter.*

Parol evidence cannot be received to show that a bill of exchange accepted, payable three days after sight, was not to be paid until a further time had elapsed.

This was an action by the payee of a bill of exchange against the drawer, after payment had been refused by the acceptor.

The principal facts in the case were the following: Mr. McDonald, the sheriff of the district of Gore, received a writ of *Fi. Fa.* against the goods of one Parker, at the suit of the plaintiff, and seized and took into his possession sufficient property to satisfy, as he supposed, the amount endorsed to be levied on the writ, together with the costs. The defendant was his deputy, and sold a part of the goods on the *Fi. Fa.*, the proceeds of which had been paid to the plaintiff, who was then at Hamilton, in the district of Gore. The plaintiff was desirous of returning to Montreal, but was anxious, before he went, to settle the whole claim which he had on the execution, for which end he entered into an arrangement with the sheriff and the defendant to the following effect. The defendant agreed to draw a bill of exchange in favor of the plaintiff on the sheriff for the balance then due the plaintiff, although the goods seized under the execution had not realized the amount, and to make the bill payable at three days' sight. It was verbally agreed at the same time, that, notwithstanding the bill was drawn payable at so short a period, still the plaintiff should not have a right to call for the amount, either from the drawer or acceptor, sooner than the sheriff could make the money from the sale of the goods in his hands on the *Fi. Fa.*

The bill produced in evidence contained no condition or qualification, but was payable on the face of it at three days' sight; but the defendant proved the facts already stated, and the jury found a verdict for the plaintiff. The present rule issued calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted on the law and evidence.



*Per Cur.*—We think the rule should be discharged. There is no principle of law more clearly established than the one which prohibits the terms of a written instrument adopted by the contracting parties from being changed or qualified by parol testimony where no fraud exists. A violation of this rule would introduce into the transactions of society the greatest danger of perjury, and would ultimately destroy all the beneficial effects of the Statute of Frauds.

Rule discharged.

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DONNELLY V. GIBSON.

*Costs—Promissory note originally beyond jurisdiction of inferior court.*

When the amount of a promissory note, originally beyond the jurisdiction of the district courts, had been reduced within that jurisdiction by payments before action brought, full costs were refused.

The court was applied to in this case to direct the Master to tax King's Bench costs for the plaintiff.

The action was brought on a promissory note for the sum of £45, by the payee against the maker, upon which payments had been made, reducing the amount to £15 12s. 6d., inclusive of interest, for which the defendant gave a cognovit before trial. The question was whether this case could have been brought in the District Court, for if it could be legally instituted in that court, no more than district court costs should be allowed.

*Per Cur.*—In the case of *Johnson v. Kenricson*, (2 Wils. 262), the court were of opinion that a bill of exchange may be endorsed for a part of the amount when the residue has been paid, and that the endorsee can sue for the balance due.

Upon the same principle we think the payee, in this case, could have sued the maker for the balance due, and might have stated in the declaration the amount of the note, and the fact of part of it having been satisfied, and claimed the balance only. The case would then have appeared to be within the jurisdiction of that court.

If the defendant had claimed a set off upon an account current against the plaintiff, consisting of items which had



not been specifically paid in satisfaction of part of the note, then, we incline to think, the action could *not* have been brought in the District Court, and that full costs should have been allowed in this court; but as the case is, we think no more than District Court costs should be taxed.

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### HALL V. HUNTER.

#### *Practice—Interlocutory judgment.*

It is not irregular to sign interlocutory judgment in the office of a deputy clerk of the crown in the country, when by rule of court the principal office in town is not open.

An application was made to the court to set aside the interlocutory judgment and the subsequent proceedings in this cause for irregularity.

The attorney for the plaintiff resided at Peterborough, and employed his brother, who was not an attorney, to go to the office of the deputy clerk of the crown for the district of Newcastle, about three miles from Cobourg, to file the interlocutory judgment in this cause, in case no plea were filed, when the time for pleading should expire. A demand of a plea was served on the 11th of September last, and on the 20th of September, at about eight o'clock in the morning, the plaintiff signed judgment, and, on the Monday, and about half an hour after, the plea of the general issue was filed.

Robert Armour, the brother of the plaintiff's attorney, who filed the interlocutory judgment, saw Mr. Boswell, the agent of Mr. Kirkpatrick the defendant's attorney, and told him he would consent to withdraw the interlocutory judgment on payment of costs. Upon informing the attorney of the plaintiff of this agreement he dissented from it, and Robert Armour informed Mr. Boswell of such dissent immediately after. Robert Armour proved he had no authority either general or special from the attorney of the plaintiff to make the agreement.

The irregularities suggested were, 1st, that the interlocutory judgment was not signed within the office hours of the principal office in Toronto, viz. between the hours of ten in the morning and three in the afternoon. 2ndly, that the



agent of the plaintiff's attorney agreed to withdraw the judgment.

SHERWOOD, J.—It appeared by the affidavit of the deputy clerk of the crown for the district of Newcastle, that no office had ever been established, and that the attornies were in the habit of transacting business in his office at all hours of the day. In this case, however, the time for pleading was out two days before the judgment was signed, and therefore the defendant had no reason to complain of the time of signing judgment being earlier than the hour of opening the office in Toronto. With respect to the agreement of the agent of the plaintiff's attorney to withdraw the interlocutory judgment, it appears from his own affidavit that he had no authority to make the agreement, and the attorney promptly dissented from it, when he was apprised of what his agent had done. The agreement not having been acted upon by actual withdrawing, the interlocutory judgment cannot, in my opinion, be binding on the attorney after he repudiated it.

As there is no affidavit of merits, I think the present interlocutory judgment should not be disturbed, but that the rule *nisi* should be discharged.

MACAULAY, J.—The proceeding I consider valid, and I know of no law or practice which would render a proceeding void or irregular, when a paper was filed before nine in the morning, or after three in the afternoon. It is also objected that the agent of the plaintiff's attorney who filed the interlocutory judgment agreed subsequently to waive the same. This is admitted; but the plaintiff contends that the agent of the plaintiff's attorney had no authority from his principal to waive such judgment, and the plaintiff's attorney swears that he dissented from such arrangement, and that the judgment was not in fact withdrawn. I think the rule must be discharged. The judgment was regularly signed and was not withdrawn according to the undertaking of the agent, who had in fact no authority to withdraw the same.

Rule discharged.



## RIGNEY V. RUTTAN.

*Escape—Liability of sheriff when arrest made by bailiff without warrant—Duty of sheriff charged with an arrest.*

A sheriff is not liable for an escape when a bailiff arrests a debtor without any warrant against him, although the bailiff has the writ in his possession. When the sheriff goes to the known residence of a debtor and *bonâ fide* searches for him to make an arrest, without success, because the debtor has absconded, he has done all that is required; and he is not liable for not arresting after the debtor's return, unless it be shewn that he had notice of such return.

This was an action on the case against the sheriff of the district of Newcastle. The declaration contained three counts—1st. For an escape of a prisoner arrested on a writ of *Ca. Re.* 2nd. For not arresting when he might have done so. 3rd. For making a false return of *non est inventus*, when he had, in fact, arrested the debtor.

It appeared by the evidence adduced at the trial that the plaintiff sued out aailable writ of *Ca. Re.* against one Cottingham, returnable on the first day of Hilary Term, 1 Vic., to which the defendant returned *non est inventus*. The defendant received the writ on the 25th of November 1837, and immediately despatched his under-sheriff to the residence of Cottingham for the purpose of arresting him on that writ, but the under-sheriff ascertained that Cottingham had left his house and had gone into the interior among the Indians.

Edward Grierson and James Chalmers was occasionally employed by the defendant as his special bailiffs to execute writs in that district, under appointment from him. After the unsuccessful attempt to arrest Cottingham had been made by the under-sheriff, he came up to this city on business, and the defendant at the same time went into the Midland District, and while they were absent Edward Grierson took the writ against Cottingham, and he and Chalmers being out in the country together accidentally met with Cottingham, and Edward Grierson directed Chalmers to arrest him, who accordingly did so, and then delivered him into the custody of Edward Grierson, while he had the writ. Grierson suffered Cottingham afterwards to escape.

The learned judge, at the trial, was of opinion that the second count was sustained by the evidence, and that the



defendant was liable to the plaintiff in damages for neglecting to arrest Cottingham. He considered the fact of the arrest by Chalmers as conclusive to prove that the defendant might have arrested him himself.

SHERWOOD, J., delivered the judgment of the court.

When the sheriff goes to the known residence of a debtor and *bonâ fide* searches for him to make an arrest without success, because the debtor has absconded to avoid being served with process, we think he has done all that his duty requires till he receives notice of the debtor's return, or reappearance. If such notice be given to his officer, we think it tantamount to giving it to himself; but, in this case, no notice of the fact was given either to himself or his officer, and there is no allegation that the plaintiff ever attempted, or designed to give it; indeed, it does not appear that he even knew of Cottingham's return from the Indian country before Chalmers accidentally happened to meet with him. The mere possession of the writ by Edward Grierson conferred no authority from him to execute it, and therefore there was no privity between the defendant as a public officer to whom the writ was directed and Edward Grierson, who directed Chalmers to arrest Cottingham. Neither Grierson nor Chalmers could therefore justify the arrest, and the defendant was then ignorant of Cottingham being in the district. Grierson and Chalmers knew nothing of it from previous information but by mere accident, which clearly affords no evidence of negligence on the part of the defendant any more than any other fortuitous occurrence.

We think the jury should have found a verdict for the defendant, and that the present verdict should be set aside without costs.

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EASTWOOD ET AL V. MCKENZIE.

*Attainder—Sheriff—Return.*

An insufficient return to a *Fi. Fa.* is as no return, and the course is to move for an attachment, not to quash the return.

The property of a person attainted for high treason is not forfeited until the attainder is complete.

*Quere* as the effect of a defendant becoming attainted between the seizure and sale of his goods under a *Fi. Fa.*

This was a motion to quash the return of the sheriff of the



Home District to the writ of *Fi. Fa.* against goods in this cause, which return stated that "the writ came to his hands on the 28th day of June last, for £264 10s. 2d. and interest; that although he had in hands certain goods and chattels which were of the defendant, of the value of £50, he had not proceeded to make the sum on the said execution, because it appeared on record in this court that a bill of indictment was found at a special session of Oyer and Terminer and gaol delivery, begun and holden at Toronto on the 8th of March last, against the defendant, for high treason, laid on the 4th of December last; also, that a writ was issued at the said assizes to the Home sheriff to take the defendant to answer for such treason—which writ was returned *non est inventus*. By means of which premises, and that the goods of the defendant became liable to forfeiture to the Queen for the treason aforesaid before the writ of *Fi. Fa.* annexed came to his hands, he cannot proceed to the sale of the said goods which were of the defendant, as by the said writ commanded."

The *Fi. Fa.* was tested the 23rd of June, and issued the 28th of June last; returnable on the first day of Michaelmas term last.

MACAULAY, J., delivered the judgment of the court.

We do not find that exception is properly taken to the return of a *Fi. Fa.* by motion to quash it, but by moving an attachment, by reason of its insufficiency and, in effect, want of obedience to the rule; or perhaps an action might lie for not levying the debt, alleging that he might have done so, but on the contrary made return of an insufficient excuse. This application, therefore, cannot be granted. As to the return, it appears to us to be uncertain: the sheriff does not say that he has in hand goods of the defendant, but goods which *were* of the defendant, not saying when, or by what authority he has them on hand, or when they ceased to be the goods of the defendant. He does not shew when the writ issued, commanding him to take the defendant to answer the indictment for treason, but merely that it issued at the said assizes; whereas the special session of gaol delivery, if that



court be meant, is not properly designated as the assizes; he does not shew when the *capias* or bench warrant alluded to was tested, or when or where it was returnable, or when or where, in point of fact, it was returned; consequently it does not follow from the premises that the goods of the defendant became liable to forfeiture, or that they were forfeited for the treason aforesaid. For the treason they would not be forfeited till attainder, and it is not alleged that the defendant is yet attainted. It follows that the only present ground of forfeiture must be his flight; but for such flight the forfeiture would not attach, until and from the time of its being judicially evidenced, or found of record.

No authority shews that the return of the first *capias*, *non est inventus*, establishes such flight; it is said to be issued from the time that he is put in *exigat*, but it is not suggested here that any writ of *exigat* had issued against the defendant before the return, to the writ of *Fi. Fa.*, nor does it appear that any ulterior proceedings had followed the *capias* under the late provincial statute 1 Vic. ch. 9, analogous in character and object. We cannot say that the mere return of *non est inventus* to the first *capias* is sufficient, nor are we prepared to say that no subsequent proceeding under the provincial statute would be so. It may be a nice question owing to the deviation from the ordinary course of proceeding to outlawry.

Another question might arise, in the event of an attainder or flight being established between the seizure and sale of goods taken under a *Fi. Fa.* In such event, the rights of the crown and subject would come into collision; and it may be found that, when it so happens, the title of the former is paramount and must prevail. If by the seizure alone the property in the goods is not altered, they would remain those of the debtor, and while his the crown would become vested with the right; whether freed from the lien of an execution creditor having already seized, but not having sold, would be the question.

Application refused.

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## EASTER TERM, 2 VICTORIA.

## GIBSON V. CUBITT.

*Damages.*

When A. purchased a lease from B. and B. covenanted with him to re-purchase at the end of three years for a greater price than he paid, and after the three years had expired A. tendered an assignment of the lease, which B. refused;

*Held*, that in an action on the covenant, A. was entitled to recover as the amount of damages the price agreed on by B. for the re-purchase.

COVENANT on an agreement of the defendant to purchase a certain parcel of land under the following circumstances: The defendant being in possession under a lease from the Crown, of the west half of lot number twelve, in the second concession of Darlington, a clergy reserve, applied to the plaintiff to purchase it from him at £200, and to induce the plaintiff to do so, offered to re-purchase at any time after three years, should the plaintiff wish to sell, and to pay him £250, and also for all improvements made by the plaintiff on the land not exceeding £60, and such instalments as the plaintiff should pay to the Crown towards the purchase of the fee of the lands. On the 3rd of July, 1834, an agreement signed and sealed by the defendant and signed by the plaintiff, was entered into, by which, after reciting the particulars of the agreement, the defendant covenanted as follows:—"Now, I, the said Woolmer Richard Cubitt, do hereby, in compliance with the said agreement, undertake and bind myself, my heirs, executors, administrators and assigns, that if it shall so happen that the said Edward Gibson, his heirs or assigns, shall, after three years from this date, wish or desire to sell or dispose of his or their interest in said lot of land in said herein in part recited deed of assignment mentioned and described, that I, the said Woolmer Richard Cubitt, my heirs, executors, administrators and assigns, will purchase back the same from the said Edward Gibson, his heirs or assigns, and pay unto him or them the sum of two hundred and fifty pounds of lawful money of the province of Upper Canada, for his and their interest therein, being £50 more than the purchase money paid me by the said Edward Gibson for my interest in the said lot of land; and will also pay and allow the said



Edward Gibson, his heirs or assigns, for any building or buildings which he or they may have erected or built thereon, not exceeding in value £60; and will also pay and allow the said Edward Gibson, his heirs or assigns, for any instalment or instalments which he or they may have paid unto the crown toward the purchasing of the fee of said lot of land herein before mentioned and described. In witness, &c. &c."

Before the spring of 1837, the defendant applied to Mr. Henry Hagarty to write to the plaintiff, who had returned to Ireland in May 1835, to know if he would give up the farm before the expiration of three years. Mr. Hagarty did so, and received an answer that the plaintiff would give up the farm at any time on receiving his money, and this answer was communicated to the defendant. The plaintiff had, before he left the province, offered the place for sale, and had put up hand-bills, and Mr. Hagarty also, as his agent, had offered it for sale.

On the 12th July 1837, after the expiration of three years, Mr. Hagarty, as agent of the plaintiff, offered the place to the defendant, who then said the place had been injured to the amount of £30, which sum he wished Mr. Hagarty to deduct from the purchase money. Mr. Hagarty declined doing so, but offered to deduct \$30, which the defendant at first refused, but afterwards agreed to accept.

On the 24th of November, 1837, the plaintiff executed, in Ireland, a deed assigning to the defendant all his interest in the lot of land and premises, the fee of which he had agreed to purchase from the Crown on the 12th of November, 1834, and for which he had paid up to the 23rd of January, 1838, four instalments at 25s. per acre. On the above day, the 24th of November, 1837, the plaintiff also executed a power of attorney to John H. Hagarty to act in all matters as his agent, &c.

On the 26th of January, 1838, the deed executed by the plaintiff was tendered by his agent to the defendant, and he then and has always since refused to accept it.

This action was brought on the covenant, and it was alleged in the declaration that although after the expiration



of three years from the date of said deed poll, to wit, on the 25th day of January, 1838, at Toronto, he, the said plaintiff did desire to sell his interest in the said lands, and did then and there request the defendant to purchase back the said land and to pay him the sum of £250 according to the covenant, and also to pay him four instalments paid by the said plaintiff, amounting to a large sum of money, to wit, £54 10s.; and although plaintiff did at the time of the said request tender to defendant a conveyance of the interest of said plaintiff in the said land, yet said defendant did not nor would, when so requested, or at any time since, accept the said last mentioned conveyance, but wholly declined and refused to do so, and did not nor would then or at any time since pay to the plaintiff the said sum of £250, and did not pay the said instalments, amounting to £54 10s., so paid by plaintiff—but therein wholly failed and made default, contrary to the tenor and effect of the said deed poll and of the defendant's covenant in that behalf; and so the plaintiff saith the defendant hath broken his covenant, &c. to plaintiff's damage of £600.

A verdict was rendered for the plaintiff for £283 10s. damages, to be reduced to £25, if, in the opinion of the court, the legal property in the land still remained in the plaintiff, and he was entitled only to damages for a breach of covenant on the part of the defendant in not repurchasing the lands.

SHERWOOD, J.—It appears to me necessary, upon the finding of the jury in this case, to consider whether the deed of the plaintiff, which he delivered to a stranger for the use of the defendant, did convey the plaintiff's interest in the premises to the defendant; for if it did, the verdict must be considered as absolute for the greater sum, and must stand as if a lesser sum had not been mentioned by the jury.

When one man conveys either real or personal property to another by deed, the legal presumption undoubtedly is, that the grantee will assent to take the property conveyed to him; and this presumption originates in the principle of self interest. What appears to be beneficial is naturally



desirable; but as no man is compellable to accept of property against his will, and, as a conveyance of an estate to him may possibly be made in such a manner as to be detrimental rather than advantageous to him, the presumption that he will accept it continues in force only till it is repelled by contrary evidence—that is to say, till clear proof be adduced of a refusal to accept the conveyance. In 1 Salk. 301, it is stated on the authority of 3 Co. 26 *b*, 5 Co. 120, Dyer 49 *a*, “If A. makes an obligation to B. and delivers it to C. to the use of B., it is the deed of A. immediately; but B. may refuse it, and by that the bond will lose its force: so of the gift of goods and chattels; if a deed be delivered to the use of the donee, the goods and chattels are in the donee immediately before notice or agreement; but the donee may refuse, and by that the property and interest will be divested.” This legal position is clearly confirmed, so far as relates to the effect of a delivery to a stranger, in the case of *Doe ex dem. Garnons v. Knight* (5 B. & C. 671). In that case a deed was delivered to a third person for the use of the grantee, and it was decided that the estate immediately vested in the grantee by such delivery, although the third person to whom the deed was delivered was not the agent of the person in whose favour the deed was made. Whether the refusal of the grantee to accept the deed divested the estate and rendered the conveyance void, formed no part of the points in issue in that case, and, consequently, the decision of the court did not embrace any question of that kind.

It becomes necessary, however, to make the enquiry in the present case; for if the plaintiff, by law, has the property, still it will remain to be considered whether he is entitled to damages to the amount of the price which the defendant covenanted to pay for it upon receiving a title from the plaintiff; or, in other words, whether his refusing to accept the title tendered to him placed him in a better situation than if he had accepted it.

In Sheppard's Touchstone 285, which is a book of undoubted authority, it is advanced as law “that a feoffment, gift, grant or lease, and the estate thereby made, may become void by forfeiture, or upon a breach of a condition, or



determined by a limitation of estate, or of uses ; also, they may become void, or rather fail of effect, by disagreement or refusal ; for no estate can be made to a man of any thing in fee simple, for life or otherwise, against his will ; and therefore, by his disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void.”—“The law presumes that every grant is for the benefit of the grantee ; and therefore, till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then, in construction of law, the grant is void *ab initio*, as if no grant had been made, and in intendment of law the freehold never passed from the grantor.” “And, if it be but *a lease for years* that is made, *he may waive and avoid that* by word of mouth in the country, as well as a gift of goods, or an obligation delivered to his use.”

I think the law as laid down in Sheppard's Touchstone is correct, because it seems to be founded on reason ; and I find no case whatever which contravenes the principle or warrants a different conclusion ; and therefore, as the estate in the deed from the plaintiff was only a term of years, the refusal of the defendant to accept the conveyance renders it, in my opinion, a nullity. I incline also to think, that a refusal to accept a deed conveying an estate in fee would have the same effect to avoid the deed. In the case of Townson v. Tickell et al. (3 B. & A. 31), where it was decided that a devisee in fee may by deed without matter of record disclaim the estate devised, it was not said by any of the judges that such disclaimer by parol would not be valid ; but Mr. Justice *Holroyd* expressly gives his opinion that it would, and cites the case of Bonifaut v. Greenfield (reported in 1 Leon. 60, and in Cro. Eliz. 80) as confirmatory of his view of the subject. Mr. Justice *Best* was of the same opinion ; he said, “It seems to be contrary to common sense to say that an estate should vest in a man not assenting to it ; there must be the assent of the party before any interest in the property can pass to him.”

The law presumes every grant to be advantageous to the grantee, but his refusal to accept it affords evidence to the contrary, and therefore the presumption is destroyed. *Stabit*



*præsumptio donec probitur in contrarium*, is the well known maxim of the common law.

Presuming, therefore, that the plaintiff has the whole of the interest for the remainder of the term in the west half of lot number 12 before mentioned, I will proceed to inquire whether the defendant, notwithstanding his refusal to accept the deed, has not a right to it whenever he may think proper to apply to this court for it; and, if he should obtain possession, whether the interest in the term would not then vest in him. If he has such a right, there would seem to be no good reason why he should not be liable to the plaintiff for the full amount of the price of the premises, as agreed upon by himself, but if he has no such right the matter may be doubtful.

My opinion is that he has no such right, and I found it on the doctrine expressed in Whelpdale's case (5 Co. 119 *a*), where it was resolved, that if a bond be delivered to another to the use of the obligee, and it is tendered to him, and he refuse it, the delivery has lost its force, and the obligee *can never after agree to it*. That case is an authority to shew that the deed which was tendered to the defendant is a nullity by his refusal to accept it.

And now it remains to examine whether this action lies, and what amount of damages the plaintiff may recover. The plaintiff tendered a conveyance, which was not objected to for want of title in him, or for any informality in the deed itself; and therefore I take it for granted there were no grounds to object, and, consequently, that the present action is sustainable—*Jones v. Barkley* (Dougl. 684) and *Luxton v. Robinson* (Dougl. 620, and 8 East 443). I also think the plaintiff may recover the amount of the price agreed upon between them (3 East 410, and 6 B. & C. 506,) as well as the the amount of the instalments paid by him to the Crown as a part of the purchase money for the fee simple of the lands.

Whether the defendant is the owner of the land or not, by the deed which has been produced, can make no difference, in my opinion, in the right of the plaintiff to his remedy by action on the deed of covenant, because he has offered to perform all that was necessary to give him the right under the terms of that instrument. The principle is clearly stated



in Dougl. 684, and recognised in 8 East 443, which is this, that when a man "by doing a previous act would acquire a right to a debt or duty, by a tender to do the previous act, if the other party refuse to permit him to do it he acquires the right as completely as if it had actually been done."

The law being in favour of the plaintiff, and the damages not being excessive, according to my view of the case, I think the plaintiff should have leave to enter judgment for the £283 10s.

McLEAN, J.—At the trial of this cause I had strong doubts whether the plaintiff was entitled to recover the whole amount covenanted to be paid by the defendant on his re-purchasing the lands, and was inclined to think that he could only recover damages for the refusal of the defendant to re-purchase, but recommended to the jury to find for the whole amount claimed, subject to the opinion of the court on that point; and the jury was directed to state the amount of damages to be awarded to the plaintiff if the court should be of opinion that the plaintiff, retaining the land, he was not entitled to the whole amount claimed by him. The agreement of the defendant is to pay a sum of £250 and such sums as the plaintiff might advance towards the purchase of the premises from government, at any time after three years, provided the plaintiff would sell to him and assign his interest in the premises. The plaintiff, on being applied to before the expiration of three years, notified the defendant of his readiness to do so at any time; and after the expiration of three years the defendant accepted of the premises from Mr. Hagarty, as the plaintiff's agent, subject to the deduction of \$30 for injury alleged to have been done to the premises. When the deed executed by the plaintiff, pursuant to his desire previously expressed, and notified to the defendant, was tendered to the defendant, he refused to accept it, or to pay the money which he had covenanted to pay, should the plaintiff desire to sell. Under these circumstances, I think the plaintiff is entitled to the *postea* for the whole amount of the verdict; and if the defendant is placed in a more unfavorable situation than he should be by his refusal to accept the deed, he has only himself to blame, and must now pursue such remedy as the law affords him.



## DOE EX DEM. CONNER V. COLLIER ET AL.

A defendant in ejectment cannot set up a title by estoppel in a stranger, unless he claims under him.

A grant from the Crown issued on the 14th of April, 1831, to Ann Connor, wife of Aaron Connor, for the undivided half of lot number 16, in the 1st concession on Prince Edward Bay, in Marysburgh (then in the Midland District), and to her heirs and assigns, forever. Ann Connor the grantee, and Aaron Connor her husband, conveyed the same premises to the lessor of the plaintiff in fee, by indenture of bargain and sale dated the 26th of July 1834.

A legal title to the undivided half of the lot was thus established in the plaintiff.

The defendants contended, however, that Aaron Connor, before the grant from the Crown issued to his wife, conveyed the undivided half of the lot to one Silas Hill, to have and to hold to him, his heirs and assigns forever, by indenture of bargain and sale dated the 25th of January 1820, which contained a general covenant of warranty.

This deed, they alleged, had the legal effect, by way of estoppel, to vest the estate in Hill during the life of Aaron Connor.

*Per Cur.*—It appears by the evidence that the deed was never accepted by Hill, and, consequently, was inoperative for any legal purpose, either by transferring the estate in fact or by estoppel.

The lessor of the plaintiff has therefore a right to retain the verdict given in his favour, and the present rule must be discharged.

Rule discharged.

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MITTLEBERGER ET AL. V. CLARK.*Arrest—Privilege.*

A person who having attended as a grand juror at a court which adjourned for a few days, went into another district on private business, was held not to be privileged from arrest there during such adjournment.

The plaintiffs recovered a judgment against the defendant in this court, and he was taken in execution upon a writ of



*Ca. Sa.* issued on that judgment, and made application to this court to discharge him. He grounded his application on the following facts:—He was summoned as a grand juror, and attended a special court of oyer and terminer, which commenced its sittings at Niagara three or four weeks before this term. About a fortnight after or more the court adjourned for eight or ten days, and during that period the defendant came from the district of Niagara, where he resided, to Toronto and was arrested. He contended that as a grand juror he was privileged from arrest in civil suits.

*Per Cur.*—If a party, or his counsel or witness, is arrested by process from this court while going to, attending on, or returning from a court of justice, we have no doubt that this court, upon proper application, would discharge him; and we see no reason why a petit or grand juror should not be entitled to the same privilege. We think he certainly is; but still it appears to us the defendant has not shewn a sufficient claim to it in this instance.

At the time of his arrest he was not in fact performing any duty applicable to the character of a juror. He came from his home in the district of Niagara, at a time when the court in which he was bound to act as a juror was not in session; and he was arrested while he was in another district on his own private concerns. His character as a juror was at least suspended during his stay in this district and during the adjournment of the court. Under such circumstances, we think the rule should be discharged.

Rule discharged.

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### HOLLISTER V. BARNHART.

#### *Practice—Peremptory undertaking.*

The motion to discharge a rule for judgment as in case of a non-suit on the peremptory undertaking must be made in open court, and be supported by affidavit.

A rule *nisi* issued in this case to shew cause why judgment as in case of a non-suit should not be entered against the plaintiff for not proceeding to trial according to the practice of the court.



Before the return of the rule a side-bar rule was taken out to allow the plaintiff to enter into the peremptory undertaking to go to trial at the next assizes, but no affidavit was filed stating any excuse or reason for not having proceeded to trial on the notice theretofore given. The defendant then moved the court and obtained the present rule, calling on the plaintiff to shew cause why the side-bar rule and peremptory undertaking which followed should not be set aside for irregularity.

*Per Cur.*—There are two questions to be considered:—1st, can a plaintiff of right enter into the peremptory undertaking without stating some excuse or affidavit why he did not proceed to trial before? The case in 2 Dowl. P. C. 60, and 3 Dowl. P. C. 160, are authorities in point to shew he cannot. The other question is, whether he can take out a side-bar rule for the purpose of entering into the peremptory undertaking. We think it clear that the practice is otherwise, and that he cannot properly proceed in that way. The peremptory undertaking should be made in open court, at the time the defendant moves to make the rule for judgment in case of a non-suit absolute; and, at the same time, some cause supported by affidavit should be shewn, to induce the court to allow the plaintiff's application to enter into the peremptory undertaking to go to trial at the next assizes. This is the English practice, and should be followed in future, till it may be done away or modified by some rule of this court.

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### HAMILTON v. McDONELL.

#### *Trespass—Statute of Frauds.*

An agreement to enter upon and clear land, and take the wood after it is cut down in payment of the labour is not for an interest in lands within the Statute of Frauds; and the person clearing the land may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass *quare clausum fregit*.

This was an action of trespass both to real and personal property. There was one count in the declaration for breaking and entering the plaintiff's close, and another count for



taking and carrying away the goods of the plaintiff; to which the defendant pleaded the general issue; and at the trial of the cause the plaintiff recovered a verdict on the whole declaration.

After the evidence for the plaintiff was closed, the counsel for the defendant moved for a non-suit, on the following grounds: first, because the agreement between the parties was void, it being for an uncertain interest in lands. Secondly, because the agreement was not to be performed within a year from the making of it.

These objections were over-ruled, with leave to move; and the defendant in last term obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered, or why there should not be a new trial, on the ground of the verdict being against law and evidence.

It appeared by the testimony that the plaintiff and defendant made a parol agreement to the following effect, which gave rise to the present suit:—The plaintiff contracted to clear twenty acres of the defendant's wood-land, and the defendant agreed to give the plaintiff, in payment for his labor, all the wood which he cut on the premises in clearing the land. The plaintiff was to be allowed fourteen months to perform his contract, which he immediately commenced, and cleared a part of the land, and cut and piled the wood on it, a part of which he afterwards took away and used. The defendant then forbade the plaintiff from coming on the land to clear any more, or take the remainder of the wood, already cut under the agreement; he afterwards took away the wood himself and converted it to his own use, upon the presumption that the whole agreement was a nullity.

It was contended by the counsel for the defendant in the course of the argument in *banc.* that his first objection—namely, “that the agreement was for an uncertain interest in lands,”—was available under the first section of the Statute of Frauds (29 Car. II. ch. 3,) as well as the fourth section, which latter provides “that no action shall be brought whereby to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement, or



some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized."

SHERWOOD, J., delivered the judgment of the court.

We incline to think the agreement between the parties was not for any interest in lands. The trees standing on the premises were not sold by the defendant to the plaintiff to pay him for clearing the land, but the quantity of wood which the trees made after they were severed from the soil, and after they became personal property, were to be taken by the plaintiff in payment for clearing the land by cutting down the brush and underwood as well as the trees themselves. He could not have sold the standing trees to a third person, because he was entitled to no pay sooner than he cleared the land, and that was not cleared while the trees were standing; the trees therefore continued to be the property of the owner of the land till they were cut down by the plaintiff, and then he claimed them under the contract in satisfaction of his demand for labour.

With respect to the second objection, "that the agreement, was not to be performed within a year from the making of it," it was urged for the defendant that the agreement is within the last branch of the fourth section of the Statute of Frauds. It is enacted by that part of the act, "that no action shall be brought to charge any person upon an agreement that *is not* to be performed within the space of one year from the making thereof, unless the agreement shall be in writing, &c." In the case of *Boydell v. Drummond* (11 East 159) *Bayley, J.*, expressed the correct principle of construction applicable to this part of the Statute of Frauds, which is found in the judicial decisions before that period, and particularly in 1 Salk. 280, and 3 Burr. 1279. He said—"the cases have decided, that in order to bring a contract within this branch of the statute, it must either have been *expressly stipulated*, or it must appear to be the understanding of the parties, that it was *not* to be performed within a year." In the present case it was not specifically stated that the agreement should not be performed within a year, and the nature



of the contract does not shew that such was the understanding of the parties; on the contrary, it rather proves the reverse. The plaintiff was to clear twenty acres of land and take the wood in payment, and he was at liberty to clear it as soon as he thought proper, but was obliged to complete the whole work within fourteen months, at farthest. The sooner he performed the work the sooner he would reap the advantages of the contract, and there is nothing to shew that he might not have cleared all the land in six months, or even in a shorter time; we incline therefore to think the agreement is not within the words or spirit of the act, which only embrace contracts *not* to be performed within a year, and not those which may be performed, according to the agreement, within that period, although a longer time is allowed by the terms of the contract, at the election of the parties interested.

It is our opinion that the contract for clearing the land is a valid agreement, and that the plaintiff had a right to enter on the premises for the purpose of clearing away the underwood and felling the trees, and afterwards to take away the wood lying on the ground for his own use. This is a mere easement, and therefore he had no possession of the land, and could maintain no action of trespass against the defendant for entering upon it. Such an easement is not within the Statute of Frauds—Palm. 71, 8 East 308, and 7 Taunt. 374; and the plaintiff under the agreement acquired the legal property in the wood lying on the land, and may recover damages in an action of trespass for the "*asportavit*" of his goods.

The present verdict is general, and evidence was given on the whole declaration, and consequently the verdict is against law, and should be set aside without costs. The plaintiff may then proceed or not, as he may think proper, as regards the trespass to personal property.

Rule absolute.

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## KING V. ORR.

*Justices of the peace—Bail.*

Although a statute may require the presence of *three* justices to convict of an offence, yet *one* has power to bail the offender, and a second arrest for the same charge, by the same complainant, before the time appointed for the hearing, is illegal.

This was an action of trespass and false imprisonment. The defendant was a deputy collector of customs, and arrested the plaintiff for peddling without a license, late on a Saturday evening, and took him before a justice of the peace, and informed him of the cause of the arrest. The justice, finding that two other justices could not be procured that evening to form a court of three magistrates, according to the 3rd section of 58 Geo. III. ch. 5, bailed the plaintiff, who entered into a recognizance with two sureties to appear at the court house in Perth the next Monday morning, to take his trial. The justice then discharged the plaintiff, and he with his two sureties and the defendant left the magistrate's house, and went into the public highway, when the defendant again arrested the plaintiff upon the same charge, and holding him by the collar, took him to an inn, and kept him there about two or three hours, and then discharged him. The plaintiff appeared at the court house on the following Monday morning, took his trial, and was duly convicted of peddling without a license, upon his own confession.

The conviction signed by three justices of the peace was given in evidence as a justification under the plea of the general issue, which the statute 58 Geo. III. ch. 5, allows to be done by a deputy collector.

At the trial, the learned judge (Sherwood) thought it was a justification of the first arrest and detention, but as there were several counts in the declaration he directed the jury to give a verdict and damages for the second arrest and imprisonment, and subject to the opinion of this court whether the justice who bailed him was correct in that step.

SHERWOOD, J., delivered the judgment of the court.

We have examined into the law of bail, and we think a justice of the peace has a right to admit to bail in all cases



of misdemeanor by the common law, and consequently must have had a legal right to bail in this instance, unless prevented by some statute, which we are not aware is the case.—2 Hale 137; Dalton, ch. 12; Hawk. book 2, ch. 15, sec. 54.

Hawkins says, “It seems clear that any two justices of the peace, whereof one is of the *quorum*, may of common right bail persons indicted before the sessions, for that any two of such justices may hear and determine the indictment. Also it hath been holden that one justice of the peace hath the like power, in relation to persons so indicted, because every such justice being a judge of the court which is to determine the offence, seems consequently to have a discretionary power of judging whether it be bailable, and of admitting the person to bail.”

We think also it may be fairly implied from the wording of the provincial statute 3 Wm. IV. ch. 3, sec. 3, that one justice of the peace has a right to bail in all cases of misdemeanor; and it appears to us that all statutes should be construed as far as possible, under the established rules of law, in favour of the liberty of the subject.

We have no doubt the recognizance taken by the magistrate in this case was valid and might have been enforced against the bail, if the principal had not appeared according to the condition. There was no doubt of the responsibility of the bail.

We are therefore of opinion that the plaintiff is entitled to the *postea*.

Judgment for the plaintiff.

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### RUSSELL V. WELLS.

*Promissory note—Account stated.*

- A promissory note must be for money and payable at some specific time, or on a contingency which must happen.
- A document which acknowledges a sum due at the time of its date, though payable on a future contingency, though not a promissory note, is evidence of an account stated.

The defendant was held to bail in this case on an affidavit stating that he was indebted to the plaintiff on a promissory note, drawn by the defendant in favour of the



plaintiff, and upon an account stated between the parties. The plaintiff took down the record for trial at the last assizes for the district of Bathurst, and recovered a verdict for £500; and the bail to the action moved the court in the last term, for leave to enter an *exoneretur* on the bail-piece, alleging for reason that no such cause of action as either of those stated in the affidavit, was proved by the evidence adduced at the trial.

The following is a copy of the written instrument given in evidence :

“Due to Mr. Robert Russell the sum of £500 for value received, by improvements, lumber and servitude on Madawaska river, payable at the sale, or delivery, of the timber marked “P. A.” in Quebec, or elsewhere.”

(Signed) WELLS & McCREA.

In addition to this evidence, it was proved by witnesses that the timber marked “P. A.,” was delivered to one Peter McGill, for the benefit of the defendant's creditors, some months after the above writing was signed; and that Mr. McGill's men took down a large quantity of timber marked “P. A.” to Montreal and Quebec afterwards.

SHERWOOD, J.—It is very clear the written instrument is not a promissory note, and the only question is, whether it is evidence of an account stated between the parties.

The written instrument signed by the defendant in the name of the firm states in substance that he and his partner had received from the plaintiff lumber and labour to the value of £500, which was then due, and which they promised to pay when certain timber was delivered in Quebec or elsewhere, which promise the plaintiff accepted, and accordingly waited for his debt till the timber was delivered to Mr. McGill, and by him taken to Quebec. Not being paid on that contingency, the plaintiff brings this action to compel payment. This writing appears to me to be presumptive evidence to a jury of a settlement of accounts respecting the general claims stated in it, and an acknowledgment by the defendant of a debt due by him on account of them. The plaintiff is not obliged, in support of



the count upon an account stated, to give evidence of the items constituting the account; an acknowledgment of the defendant of a sum due by him upon any account is sufficient to enable the plaintiff to recover.—1 T. R. 42, *note*; 13 East 249; 5 M. & S. 65.

Here the acknowledgment of the defendant of the amount of the debt was altogether unqualified, and the uncertainty existed in the time of payment when the acknowledgment was made, but that was afterwards reduced to a certainty before the action was brought.

I think the rule must be discharged.

McLEAN, J.—With respect to the first ground, I think the instrument does not amount to a promissory note, which must be for money, and payable at all events either at some specific time, or on a contingency which must happen. If therefore the affidavit to arrest were merely on a promissory note, the bail would be entitled to relief; but the defendant has also been arrested on an account stated, and the question is, whether this instrument is evidence of an account stated and settled at the time it bears date, or whether it is only to be considered as evidence of money to become due at a future period, or on a contingency which might never happen.

I think there is an obvious distinction between this case and that of *Morgan et al. v. Jones* (1 Tyr. 21.) In that case the money was payable in nine years, provided a certain individual died or did not return to England before that time. There is no acknowledgment of any amount due *at the time*, and its becoming due at the expiration of nine years was uncertain. In this case, however, the defendant and his deceased partner acknowledged a specific sum to be due on the 7th of February, 1837, to the plaintiff, for value received by improvements, timber and servitude; but though then due, they go on to say, “payable at the sale or delivery of the timber marked “P.A.,” in Quebec or elsewhere.” Now if the timber had been lost or destroyed, instead of being sold or delivered at Quebec or elsewhere, I think the plaintiff, on proof of that fact, would neverthe-



less be entitled to recover the amount acknowledged to be due: but on the trial it was proved that the timber had been sold and delivered by the defendant; so that, if it were even admitted that the amount acknowledged to be due on the 7th of February, 1837, was only payable from the proceeds of the timber marked "P. A.," the plaintiff has shewn that he is entitled to recover.

In the case of Knowles et al. v. Michel et al. (13 East 249), *Lord Ellenborough* says: "if there were an acknowledgment by the defendant of a *debt due* upon any account, it is sufficient to enable the plaintiff to recover upon the count for an account stated."

On these grounds, I think the rule must be discharged.

Rule discharged.

### WARREN V. SMITH.

*Practice—Judgment as in case of a non-suit.*

A rule for judgment as in case of a non-suit cannot be obtained, where there has been a trial; and, if obtained, and the plaintiff enter into a pre-emptory undertaking, he is not bound by it.

A notice of trial was given in this cause for the last assizes in the district of Niagara, and a verdict was taken for the plaintiff for £240 2s. 4d., the defendant not appearing to make any defence. He applied to this court in Hilary Term last to set aside the verdict for irregularity, and for leave to enter judgment as in case of a non-suit, upon the rule *nisi*, issued in Hilary Term, 1 Vic., or why there should not be a new trial without costs. It appeared that two new trials had been granted in this cause at the instance of the plaintiff, after a verdict had been given in favour of the defendant; that a notice of trial was given for the assizes in the district of Niagara, in 1837, but the plaintiff did not proceed to trial, and that another notice of trial was given for the assizes in May last, when the cause was made a *remanet*. It further appeared that the costs for not proceeding to trial pursuant to notice was taxed on the 3rd of October last, at £11 3s. 8d., and the Master's *allocatur* was served on Edward C. Campbell, Esq., whom



managed this suit for the plaintiff before the last assizes for the Niagara district. There was also an affidavit of merits on the part of the defendant.

The defendant made no defence at the last assizes, because the costs of the day for not proceeding to trial at a former assizes were not paid by the plaintiff. The first question was, whether this was an irregularity.

*Per Cur.*—It appeared by the minutes of proceedings in the Practice Court, on the 19th and 23rd of June last, that the rule for judgment as in case of non-suit granted in Hilary Term, 1 Vic., on the peremptory undertaking of the plaintiff to go to trial, was discharged, and the plaintiff was allowed further time to go to trial at the last assizes in the district of Niagara.

There was, therefore, no irregularity on the part of the plaintiff in going to trial at the last assizes for the district of Niagara, and the case must now be considered on the defendant's affidavit of merits.

On that ground we think he is entitled to a new trial, as he has already obtained two verdicts in his favour, which forms a presumption of his possessing the legal rights.

The costs should abide the event of the suit.

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#### HAM ET AL. V. MADDEN ET AL.

*Pleading.*—*Party suing in a representative capacity.*

Where a plaintiff sues in a representative character, the cause of action must be stated in the declaration to have accrued to him as such representative.

The plaintiffs in this cause, styling themselves Commissioners for settling the affairs of the Freeholders' Bank of the Midland District, obtained a verdict against the defendants at the last assizes for the Midland District, as the maker and indorsers of a promissory note for the sum of £75, dated the 23d of February, 1837, and payable nine months after date to Isaiah Madden, or order, and by him and one William Doudle indorsed in blank.

The defendants obtained a rule *nisi* to set aside the verdict, or to enter a non-suit, on the following grounds:—1st, that there was no evidence of the existence of such an institution as the Freeholders' Bank of the Midland District. 2ndly,



that there was not sufficient evidence of the due appointment of the plaintiffs as commissioners. 3rdly, that there was no copy of the note attached to the copy of process served on the defendants, according to the provisions of the statute 7 & 8 Wm. IV. ch. 1, sec. 1.

The pleas entered and filed by the defendants were—1st. The general issue. 2nd. That the plaintiffs were not commissioners for settling the affairs of the Bank of the Midland District.

SHERWOOD, J., delivered the judgment of the court.

Upon perusing the declaration in this case, some time after the argument in Banc, I found the plaintiffs had not declared in any count of the declaration that the defendants were indebted to them, or accounted with them as commissioners, or that they made any promise to them in that character. It therefore becomes unnecessary to consider how far the objections taken by the defendants are sustained by the facts of the case.

The declaration commences by stating that the defendants were attached to answer the *plaintiffs, commissioners for settling the affairs of the Freeholders' Bank of the Midland District, in a plea of trespass on the case upon promises, &c.*, and then alleges in four counts in *indebitatus assumpsit* that the defendants were indebted to the plaintiffs, and undertook and promised to pay them; the fifth count states an accounting between the defendants and the plaintiffs of and concerning divers sums of money before then due and owing to the plaintiffs, and upon such accounting that the defendants were found in arrear, &c., and promised the plaintiffs to pay them, &c.

There is no allegation that the action is brought by them *as commissioners*—that is, *in their character as commissioners*; and I think the count cannot intend that they sue *as commissioners*, any more than they could intend that persons styling themselves in the beginning of a declaration *executors* sued as executors without any allegation of the fact. It is clear this cannot be done in the latter case, and by analogy we think it cannot in the former.—2 B. & P. 424, 5 East 152.



The statute 7 & 8 Wm. IV. ch. 1, sec. 1, under which the plaintiffs profess to sue, seems to confirm this view of the case. The persons appointed commissioners under that act are enabled, "using their individual names, to sue as commissioners, &c., and the amount due on any security may be recovered in an action for money had and received to the use of the persons suing as commissioners." Here they do not allege they sue as commissioners.

We incline to think, however, that the plaintiffs may sustain their action as private individuals in this case. The statute 7 Wm. IV. ch. 13, entitled "An act to protect the public against private banks," was passed on the 4th of March, 1837, and renders all notes, bills, mortgages, &c., void, which may be taken for securing any loan contrary to that act. The note sued upon in this action was given before the passing of that statute, and consequently is not affected by its provisions, and the note was transferred by a blank indorsement, without date, and most probably on the day it was made. We see no valid objection to its being collected in the name of the plaintiffs in their private character, in the same way as if it had come into the hands of any other individuals in the course of business. The declaration will answer this purpose; and as there was no objection raised at the trial against the validity of the note, but only against the right of the plaintiffs to sue as commissioners of the Freeholders' Bank, we think the present rule must be discharged, as both parties seem to be equally in mistake as to the nature of the action and the form of the declaration.

Rule discharged.

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#### BOULTON V. MURPHY ET AL.

##### *Lease—Over-holding tenant.*

Where a tenant holds over after the expiration of his lease, his landlord has a right to take possession of the premises, if he can, without a breach of the peace.

This was an action of trespass to lands in the district of Bathurst, to which the defendants pleaded the general issue.

One William Murphy, the father of the defendants, was



the grantee of the crown, and sold the land to one John Lannigan, to whom he gave a bond for a deed, and possession of the land. The plaintiff bought the premises of Lannigan in 1833, upon which was then a dwelling house and out-house ; he then leased the place to one Beck and two others, for two years, at £23 a year. At the expiration of the term, Beck remained alone on the premises without making any new agreement with the plaintiff, and continued there until March, 1838, when he enlisted in the militia volunteers, and went to Brockville ; his wife and family left the place a fortnight afterwards, and went to live with the father, a few miles distant. When she went away she left a few articles of furniture in the house and locked it up. Afterwards she gave a lease in her own name to one of the defendants, David Murphy, and went to the house with him and gave him the key of the door.

David Murphy then went after his household furniture, leaving the door of the house locked ; when he returned he found the plaintiff had opened a window and had entered and taken possession of the house in his absence, and had nailed up the door. The plaintiff was standing on the steps leading to the door of the house, when one of the defendants pulled him away, and another broke open the door with an axe, and they all went into the house, and David Murphy continued in possession.

The learned judge (*Sherwood, J.*) told the jury that he thought the plaintiff had a right, as Beck's landlord, to enter into possession of the premises, if he could do so without a breach of the peace ; because Beck held over and was only a tenant at sufferance to the plaintiff.

The jury found a verdict for the plaintiff, and the defendants obtained a rule *nisi* last term to set aside the verdict as being against law and evidence, and for rejection of evidence offered by the defendants.

The counsel for the defendants alleged at the trial that he could prove that William Murphy, the grantee of the crown, had agreed to sell the premises to Beck, the tenant of the plaintiff, and had given him a bond to deliver him a deed on the payment of the purchase money.



SHERWOOD, J.—I told the counsel I thought that evidence, if adduced, would not constitute a valid defence, as it could not put an end to the plaintiff's claim or possession, under his bond from the same person, which had continued for more than seven years.

I still incline to think that the verdict should not be disturbed.

Rule discharged.

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### REGINA V. CROOKS.

#### *Information.*

A criminal information must be signed by the master of the crown office.

An information was filed against the defendant at the instance of Sir A. Macnab for a libel, and the defendant applied to set aside the whole of the proceedings, including the information itself. It was admitted that a part of the proceedings—namely, the process—was irregular, and should be set aside for want of the recognizance required by 4 & 5 W. & M. ch. 18, sec. 2; but it was contended the information was also irregular and ought to be set aside. On the other side it was insisted it was irregular, because it was not signed by the clerk of the crown in whose name it was filed. The only question was, whether it should be signed by that officer.

*Per Cur.*—In Com. Dig. title “Information” A. 2, it is stated, “the clerk of the crown ought not to *set his hand* to an information without examining the cause.” Style’s Prac. Register 270 is cited as authority for this position. In Gude’s Prac. 120, speaking of this kind of information, he says, “the information must be signed by the master of the crown office; it is then put upon the file kept for the purpose.”

These authorities seem to shew that the practice is for the clerk of the crown, or master of the crown office, to sign the information before it is filed. We think the rule must be made absolute.

Rule absolute.



## BROWN V. HIRLEY ET AL.

*Libel—Joint-publication.*

A joint action may be maintained against several persons for the joint publication of a libel.

This was an action on the case for publishing a libel in a newspaper of which Hirley was the proprietor, and McDonell, the other defendant, was the editor. A verdict was given for the plaintiff, which the defendants moved to set aside, and to have a new trial. There were two points to be considered: 1st—Whether a joint action for the publication of a libel could be sustained against two or more defendants 2ndly, Whether there was evidence before the jury from which they could legally infer a joint publication of the libel stated in the declaration in this case.

SHERWOOD, J., delivered the judgment of the court.

We think there is no doubt that two or more persons cannot be jointly sued in an action for verbal slander; for in legal consideration it is an act which cannot be committed by several persons, and must be considered the separate *tort* of each person who spoke the words, and for which separate actions only can be brought—1 Rol. Ab. 781, Cro. Jac. 647, 1 Bulstr. 15.

In the instance of written slander, or libel, the law holds a different course, and permits the plaintiff to make all who participated, either openly or by secret instigation, in publishing the libel, joint defendants in the action. It was remarked by the court in 5 Mod. 167, "If one reports and another writes a libel, and a third approves what is written, they are all makers of it; for all persons who concur and shew their assent or approbation to do an unlawful act are guilty." This doctrine was recognized afterwards in the case of *Rex v. Benfield et al.* (Burr. 980), where the court of King's Bench decided that an information would lie against several persons for a misdemeanor in jointly publishing a libellous song.

Upon these and other authorities we think a joint action may be brought against several persons for publishing a libel.



With respect to the second point, we think a *prima facie* case was made out sufficient to warrant the finding of the verdict, by the testimony of one Hagerman, a witness called on the part of the plaintiff, who worked in the printing office of the defendants at the time the newspaper was printed which contained the libel, and who stated in his testimony that the same paper was printed and circulated with the knowledge and by the desire of the defendants.

The defendants had a right to meet and explain this evidence by other testimony exculpatory of their conduct, but as they did not do so it must be presumed it was not in their power, and therefore the case made out by the plaintiff remains untouched.

We think the rule for a new trial must be discharged.

Rule discharged.

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### BRADBURY V. HOLTON.

*Bill of exchange—Commission—Usury.*

A commission of  $2\frac{1}{2}$  per. cent on drawing and accepting bills of exchange is usurious, and will not be allowed.

A verdict was taken for the plaintiff for £105 11s. 6d. subject to be reduced to £44 2s. 6d. if the court was of the opinion that the plaintiff was not legally entitled to  $2\frac{1}{2}$  per cent. commission on the amount of his acceptances and advances to the defendant.

*Per Cur.*—If it was proved at the trial that the plaintiff had been put to extra expense, or had been subjected to extraordinary trouble, and that it was the usage of merchants to charge  $2\frac{1}{2}$  per cent. under such circumstances, it would have been a proper question for the jury to decide whether the charge was a *bonâ fide* claim for such expense and trouble, or merely a colorable transaction to cover usury.

As the question stands, unaccompanied by any explanatory facts or circumstances, we think the charge of  $2\frac{1}{2}$  per cent. is not warranted by law, and that the verdict must be reduced to the lesser sum.



## BURNHAM V. CHOAT ET AL.

*Principal and surety.*

A surety cannot sue a co-surety jointly with the principal, for the amount of a debt of the principal which the surety has been obliged to pay.

This was an action of *assumpsit* in which the plaintiff sought to recover the sum of £79 11s. 9d. of the defendants, as money paid to their use. The principal facts of the case were the following :

Thomas Choat, one of the defendants, made a note to Jacob Choat, the other defendant, who indorsed it to the plaintiff, who indorsed it to the Bank of Upper Canada. Thomas Choat was indebted to the plaintiff in the amount, and the note was negotiated with the Bank to raise the money. Jacob Choat was therefore the surety of Thomas Choat.

The counsel for the defendants objected at the trial that a joint action could not be sustained against them at the suit of the plaintiff, under the facts of the case, and the point was reserved for the opinion of this court.

SHERWOOD, J., delivered the judgment of the court.

It appears to us it was an accommodation on the part of the plaintiff and Jacob Choat to raise money for Thomas Choat the debtor. The note was not paid at maturity, and the two Choats and the plaintiff were sued by the Bank, and a judgment was recovered against them. A writ of *Fi. Fa.* was sued out against all of them, and the whole amount was levied against the plaintiff alone.

In contribution among sureties, each one is liable in law for an adequate proportion of the whole sum, although one of the securities may be insolvent—2 B. & P. 268 ; in equity it is otherwise, and the solvent sureties must contribute in proportion to their number, considering the insolvents, when there are any, as no persons.

Thomas Choat is the person for whose use Jacob Choat and the plaintiff indorsed the note, and he is therefore primarily answerable to the plaintiff for the whole amount, as money paid to his use by the plaintiff ; but Jacob Choat is only liable for one half of the amount, which may be recovered from him by the plaintiff in the character of a co-surety for Thomas Choat.



managed this suit for the plaintiff before the last assizes for the Niagara district. There was also an affidavit of merits on the part of the defendant.

The defendant made no defence at the last assizes, because the costs of the day for not proceeding to trial at a former assizes were not paid by the plaintiff. The first question was, whether this was an irregularity.

*Per Cur.*—It appeared by the minutes of proceedings in the Practice Court, on the 19th and 23rd of June last, that the rule for judgment as in case of non-suit granted in Hilary Term, 1 Vic., on the peremptory undertaking of the plaintiff to go to trial, was discharged, and the plaintiff was allowed further time to go to trial at the last assizes in the district of Niagara.

There was, therefore, no irregularity on the part of the plaintiff in going to trial at the last assizes for the district of Niagara, and the case must now be considered on the defendant's affidavit of merits.

On that ground we think he is entitled to a new trial, as he has already obtained two verdicts in his favour, which forms a presumption of his possessing the legal rights.

The costs should abide the event of the suit.

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#### HAM ET AL. V. MADDEN ET AL.

*Pleading.*—*Party suing in a representative capacity.*

Where a plaintiff sues in a representative character, the cause of action must be stated in the declaration to have accrued to him as such representative.

The plaintiffs in this cause, styling themselves Commissioners for settling the affairs of the Freeholders' Bank of the Midland District, obtained a verdict against the defendants at the last assizes for the Midland District, as the maker and indorsers of a promissory note for the sum of £75, dated the 23d of February, 1837, and payable nine months after date to Isaiah Madden, or order, and by him and one William Doudle indorsed in blank.

The defendants obtained a rule *nisi* to set aside the verdict, or to enter a non-suit, on the following grounds:—1st, that there was no evidence of the existence of such an institution as the Freeholders' Bank of the Midland District. 2ndly,



that there was not sufficient evidence of the due appointment of the plaintiffs as commissioners. 3rdly, that there was no copy of the note attached to the copy of process served on the defendants, according to the provisions of the statute 7 & 8 Wm. IV. ch. 1, sec. 1.

The pleas entered and filed by the defendants were—1st. The general issue. 2nd. That the plaintiffs were not commissioners for settling the affairs of the Bank of the Midland District.

SHERWOOD, J., delivered the judgment of the court.

Upon perusing the declaration in this case, some time after the argument in Banc, I found the plaintiffs had not declared in any count of the declaration that the defendants were indebted to them, or accounted with them as commissioners, or that they made any promise to them in that character. It therefore becomes unnecessary to consider how far the objections taken by the defendants are sustained by the facts of the case.

The declaration commences by stating that the defendants were attached to answer the *plaintiffs, commissioners for settling the affairs of the Freeholders' Bank of the Midland District, in a plea of trespass on the case upon promises, &c.*, and then alleges in four counts in *indebitatus assumpsit* that the defendants were indebted to the plaintiffs, and undertook and promised to pay them; the fifth count states an accounting between the defendants and the plaintiffs of and concerning divers sums of money before then due and owing to the plaintiffs, and upon such accounting that the defendants were found in arrear, &c., and promised the plaintiffs to pay them, &c.

There is no allegation that the action is brought by them *as commissioners*—that is, *in their character as commissioners*; and I think the count cannot intend that they sue *as commissioners*, any more than they could intend that persons styling themselves in the beginning of a declaration *executors* sued as executors without any allegation of the fact. It is clear this cannot be done in the latter case, and by analogy we think it cannot in the former.—2 B. & P. 424, 5 East 152.



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We incline to think, however, that the plaintiffs may sustain their action as private individuals in this case. The statute 7 Wm. IV. ch. 13, entitled "An act to protect the public against private banks," was passed on the 4th of March, 1837, and renders all notes, bills, mortgages, &c., void, which may be taken for securing any loan contrary to that act. The note sued upon in this action was given before the passing of that statute, and consequently is not affected by its provisions, and the note was transferred by a blank indorsement, without date, and most probably on the day it was made. We see no valid objection to its being collected in the name of the plaintiffs in their private character, in the same way as if it had come into the hands of any other individuals in the course of business. The declaration will answer this purpose; and as there was no objection raised at the trial against the validity of the note, but only against the right of the plaintiffs to sue as commissioners of the Freeholders' Bank, we think the present rule must be discharged, as both parties seem to be equally in mistake as to the nature of the action and the form of the declaration.

Rule discharged.

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BOULTON V. MURPHY ET AL.

*Lease—Over-holding tenant.*

Where a tenant holds over after the expiration of his lease, his landlord has a right to take possession of the premises, if he can, without a breach of the peace.

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the grantee of the crown, and sold the land to one John Lannigan, to whom he gave a bond for a deed, and possession of the land. The plaintiff bought the premises of Lannigan in 1833, upon which was then a dwelling house and out-house ; he then leased the place to one Beck and two others, for two years, at £23 a year. At the expiration of the term, Beck remained alone on the premises without making any new agreement with the plaintiff, and continued there until March, 1838, when he enlisted in the militia volunteers, and went to Brockville ; his wife and family left the place a fortnight afterwards, and went to live with the father, a few miles distant. When she went away she left a few articles of furniture in the house and locked it up. Afterwards she gave a lease in her own name to one of the defendants, David Murphy, and went to the house with him and gave him the key of the door.

David Murphy then went after his household furniture, leaving the door of the house locked ; when he returned he found the plaintiff had opened a window and had entered and taken possession of the house in his absence, and had nailed up the door. The plaintiff was standing on the steps leading to the door of the house, when one of the defendants pulled him away, and another broke open the door with an axe, and they all went into the house, and David Murphy continued in possession.

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The counsel for the defendants alleged at the trial that he could prove that William Murphy, the grantee of the crown, had agreed to sell the premises to Beck, the tenant of the plaintiff, and had given him a bond to deliver him a deed on the payment of the purchase money.



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I still incline to think that the verdict should not be disturbed.

Rule discharged.

### REGINA V. CROOKS.

#### *Information.*

A criminal information must be signed by the master of the crown office.

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Rule absolute.



## BROWN V. HIRLEY ET AL.

*Libel—Joint-publication.*

A joint action may be maintained against several persons for the joint publication of a libel.

This was an action on the case for publishing a libel in a newspaper of which Hirley was the proprietor, and McDonell, the other defendant, was the editor. A verdict was given for the plaintiff, which the defendants moved to set aside, and to have a new trial. There were two points to be considered: 1st—Whether a joint action for the publication of a libel could be sustained against two or more defendants 2ndly, Whether there was evidence before the jury from which they could legally infer a joint publication of the libel stated in the declaration in this case.

SHERWOOD, J., delivered the judgment of the court.

We think there is no doubt that two or more persons cannot be jointly sued in an action for verbal slander; for in legal consideration it is an act which cannot be committed by several persons, and must be considered the separate *tort* of each person who spoke the words, and for which separate actions only can be brought—1 Rol. Ab. 781, Cro. Jac. 647, 1 Bulstr. 15.

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Upon these and other authorities we think a joint action may be brought against several persons for publishing a libel.



With respect to the second point, we think a *prima facie* case was made out sufficient to warrant the finding of the verdict, by the testimony of one Hagerman, a witness called on the part of the plaintiff, who worked in the printing office of the defendants at the time the newspaper was printed which contained the libel, and who stated in his testimony that the same paper was printed and circulated with the knowledge and by the desire of the defendants.

The defendants had a right to meet and explain this evidence by other testimony exculpatory of their conduct, but as they did not do so it must be presumed it was not in their power, and therefore the case made out by the plaintiff remains untouched.

We think the rule for a new trial must be discharged.

Rule discharged.

### BRADBURY V. HOLTON.

*Bill of exchange—Commission—Usury.*

A commission of  $2\frac{1}{2}$  per. cent on drawing and accepting bills of exchange is usurious, and will not be allowed.

A verdict was taken for the plaintiff for £105 11s. 6d. subject to be reduced to £44 2s. 6d. if the court was of the opinion that the plaintiff was not legally entitled to  $2\frac{1}{2}$  per cent. commission on the amount of his acceptances and advances to the defendant.

*Per Cur.*—If it was proved at the trial that the plaintiff had been put to extra expense, or had been subjected to extraordinary trouble, and that it was the usage of merchants to charge  $2\frac{1}{2}$  per cent. under such circumstances, it would have been a proper question for the jury to decide whether the charge was a *bonâ fide* claim for such expense and trouble, or merely a colorable transaction to cover usury.

As the question stands, unaccompanied by any explanatory facts or circumstances, we think the charge of  $2\frac{1}{2}$  per cent. is not warranted by law, and that the verdict must be reduced to the lesser sum.



## BURNHAM V. CHOAT ET AL.

—Principal and surety.

A surety cannot sue a co-surety jointly with the principal, for the amount of a debt of the principal which the surety has been obliged to pay.

This was an action of *assumpsit* in which the plaintiff sought to recover the sum of £79 11s. 9d. of the defendants, as money paid to their use. The principal facts of the case were the following :

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The counsel for the defendants objected at the trial that a joint action could not be sustained against them at the suit of the plaintiff, under the facts of the case, and the point was reserved for the opinion of this court.

SHERWOOD, J., delivered the judgment of the court.

It appears to us it was an accommodation on the part of the plaintiff and Jacob Choat to raise money for Thomas Choat the debtor. The note was not paid at maturity, and the two Choats and the plaintiff were sued by the Bank, and a judgment was recovered against them. A writ of *Fi. Fa.* was sued out against all of them, and the whole amount was levied against the plaintiff alone.

In contribution among sureties, each one is liable in law for an adequate proportion of the whole sum, although one of the securities may be insolvent—2 B. & P. 268 ; in equity it is otherwise, and the solvent sureties must contribute in proportion to their number, considering the insolvents, when there are any, as no persons.

Thomas Choat is the person for whose use Jacob Choat and the plaintiff indorsed the note, and he is therefore primarily answerable to the plaintiff for the whole amount, as money paid to his use by the plaintiff ; but Jacob Choat is only liable for one half of the amount, which may be recovered from him by the plaintiff in the character of a co-surety for Thomas Choat.



We think it clear that two sureties cannot be sued for contribution jointly by a third party, because each one is severally liable for his own proportion, and not for that of another surety.

The surety of a third person also cannot be sued by another surety of the same person jointly with such third person, because the surety is only liable in contribution to a co-surety for a proportionate part of the whole sum ; but if he should be sued jointly with the principal, and judgment recovered against them, the surety would be liable to have the whole amount levied on him.

The surety is liable on a different rule of law to a co-surety from that by which the principal is liable ; and in a different proportion as to the amount.

We therefore think the verdict should be set aside, and a nonsuit entered.

Rule absolute.

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### DAILY V. STEVENSON ET AL.

#### *Pleading—Request.*

Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request must be averred, but the statement of a general request will be sufficient after verdict.

This was an action of covenant on an indenture of lease, executed between the parties. The defendant pleaded *non est factum*, and performance of the covenant, according to the intent of the deed, on which the plaintiff took issue, and the cause was tried at the last assizes for the District of Prince Edward, when the plaintiff recovered £25, as damages on the breach stated in the declaration.

The defendant moved in arrest of judgment, assigning for cause, that there was no specific time stated in the declaration for finishing the house mentioned in the deed, nor was there any time stated in the declaration ; and, from the nature of the covenant, the defendant had the whole of the time for which the lease continued to perform the covenant declared on.



The plaintiff leased certain premises in the town of Picton to the defendants for the term of ten years, from the first day of May, 1837, at the yearly rent of £40, by indenture. The deed recited that the plaintiff had made a written agreement with one Converse to build a house on the demised premises, and to finish, in the manner therein mentioned, by the 1st day of June, 1838; and that the plaintiff was to pay Converse the stipulated price for the work in advance; and that he had paid him. The defendants then agreed on their part, in the indenture of lease, to superintend the finishing of the work by Converse, and at the same time covenanted with him that if Converse should fail to finish the house at the time and in the manner he promised, they would do it. The declaration stated a clause in the indenture of lease which permitted the plaintiff to re-enter and take possession of the demised premises in case the defendants, when the rent was due, neglected to pay it for sixty days after demand, and to hold the premises as if the lease had never been made.

The plaintiff in his declaration averred that Converse did not finish the house according to his agreement, but wholly failed to do so, and that the defendants (although often requested so to do) had not finished the house for him.

*Per Cur.*—A general promise to do a specific act, without stating a certain time for performance, is considered, in law as a promise to do the act in a reasonable time—3 C. & P. 178—and a special request should be averred in such a case and proved; but if a general request is stated, as in this case, it is clearly good after verdict, and, according to the latest cases, would also be good on general demurrer, but not on special demurrer—10 East 559, 365; 2 D. & R. 55.

The rule to arrest the judgment should be discharged. The amount of damages assessed by the jury has not been objected to. We take it for granted it is unobjectionable.

Rule discharged.

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## DOE AULDJO V. HOLLISTER.

*Judgment—Lien on lands—Priority of title.*

Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them.

A purchaser at sheriff's sale of lands sold on an execution against a devisee takes in preference to a purchaser on a subsequent execution, though prior judgment, against the executors of the testator.

A consent rule was obtained in this case, submitting the following special case of facts for the opinion of this court, and it was thereby agreed between the parties that a judgment of *nolle prosequi* for the defendant or confession for the plaintiff should be entered, as the case might be, immediately after the decision, as the court might think fit.

The case on the part of the plaintiff was this :

Judgment was entered up against John Barnhart and William George Barnhart, executors of George Barnhart, in favor of William Maitland, George Auldjo, George Garden and William Maitland the younger, in 1828.

Judgment was revived by *scire facias* as follows, reciting the death of George Garden in 1828.

First *Scire Facias*, returnable 1st Michaelmas Term, 1833; returned *nihil*.

Second *Scire Facias*, returnable 1st Hilary Term, 1843; returned *nihil*.

Judgment was entered thereon on the 14th day of February, 1834, 4 William IV. as of Hilary Term.

An execution against goods was issued on this judgment containing also the name of George Garden; returned 24th February, 1834, *nulla bona*.

An execution against the lands issued 24th February, 1834, returnable in 1835, also retaining the name of George Garden, to the sheriff of the Eastern District; and upon this *Fi. Fa.* the sheriff sold the west half of lot No. 19 in the first concession of Cornwall to the lessor of the plaintiff, and conveyed to him, as being the property of George Barnhart deceased, which it was admitted to be.

The defendant's case was the following :

George Barnhart, mentioned in the case of the lessor of the plaintiff, died about the year 1811, having devised, by his will dated 2nd March, 1811, and duly executed, the land in question to his son Charles Barnhart: the will was



registered on the 6th of June, 1811. After the death of the said George Barnhart, on the 23rd of December, 1831, as of Michaelmas Term, 4 William IV., John Hollister, the defendant, recovered a judgment against the said Charles Barnhart for £383 10s. 2d. On the 24th of December, of of the same year, a writ of *Fi. Fa.* was issued against the goods of the said Charles Barnhart, directed to the sheriff of the Home District, and on the 5th day of January, 1832, a *testatum* writ of *Fi. Fa.* issued to the sheriff of the Eastern District against the goods of the said Charles Barnhart. Both writs of *Fi. Fa.* were returnable the first day of Hilary term then next, and both were returned *nulla bona*; and on the 8th day of March, 1832, a *testatum* writ of *Fi. Fa.* was issued against the lands of the said Charles Barnhart, directed to the sheriff of the Eastern District, returnable on the first day of Easter Term, 1833. On the 25th day of March, 1833 the land in question was regularly sold by the sheriff of the Eastern District, under the said judgment and writ of *Fi. Fa.*, and purchased by George J. Jarvis, of Cornwall, in the said Eastern District, Esquire, and a conveyance was duly executed to him by the said sheriff, bearing date the 25th day of March, 1833. The defendant held under the said George J. Jarvis.

SHERWOOD, J., delivered the judgment of the court.

The only question for the decision of the court in this case is, whether lands are bound for the purpose of sale under the 5 Geo. II. ch. 7, by the entry of final judgment, or by the delivery of the writ of *Fi. Fa.* against them to the sheriff, as in the case of goods and chattels.

This point has already been determined in two cases by this court—namely, in *Doe ex dem. Clark et al. v. Updegrove et al.*, and in the case of *Doe ex dem. McIntosh v. McDonell* (IV O. S. 195.)

The court was of opinion in both instances that lands are not bound by the entry of final judgment for the purpose of sale under that statute, but by the delivery of the writ of *Fi. Fa.* to the sheriff, as in the case of goods and chattels.

According to the agreement of the counsel on both sides, a judgment of *nolle prosequi* must therefore be entered for the defendant.



## FISHER V. PATTON ET AL.

*Arrest—Discharge of one of two joint defendants.*

The discharge of one of two defendants in execution on a joint judgment operates as a discharge of both.

Motion to discharge the defendant Patton. Both defendants were arrested on a *Ca. Sa.* on a joint judgment against both. The plaintiff discharged Daniel, the other defendant, from the arrest.

*Per Cur.*—We think the discharge of one joint contractor from the *Ca. Sa.* discharges the debtor so discharged, so that he cannot afterwards be arrested. It operates as a release to him, and must have the same effect as regards both—2 Leon. 260, Styles 387, 6 T. R. 325, 2 Moore 235.

Rule absolute.

## McLEAN V. GRAHAM.

*Trover—Conversion—Demand.*

Where a demand is necessary in trover to prove a conversion, if it be verbal, the answer must be positive; and where a verbal demand was made on the defendant while driving at a distance from his house, where the property demanded was, and no answer was returned,  
*Held*, no evidence of a conversion.

This was an action of trover, in which the plaintiff recovered a verdict for £25, and a rule *nisi* was granted to set it aside as being against evidence. It was objected that the evidence did not shew that the defendant ever had the goods in his possession.

When the goods were demanded of the defendant he was driving along the street in a waggon, a mile from his house, where it was said the goods had been taken and left by a third person. The defendant kept driving forward and returned no answer; he merely nodded his head and remained silent.

*Per Cur.*—Where a verbal demand is personally made, the refusal must be absolute and positive, and not merely evasive.—4 Rep. 157. The plaintiff should have made the demand at the defendant's house, either verbally, or by



leaving a written demand, if he could not find him at home. A written demand left in that way is sufficient, without an absolute refusal.—1 Rep. 22, Gow. 69.

The rule must be made absolute, on payment of costs.

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STEBBINS V. O'GRADY ET AL.

*Bond to the limits.*

In a declaration on a bond to the limits, an averment that the Justices in Quarter Sessions assigned limits to the gaol is sufficient on general demurrer, and the bond is not avoided altogether because part of the condition is contrary to the statute.

The plaintiff, as assignee of the sheriff of the Home District, brought an action of debt on a bail-bond for the limits of the gaol in the city. The declaration stated in substance that on the 3rd day of August, 1836, the sheriff arrested James King on an *alias capias* at the suit of the plaintiff, and allowed him the use and benefit of the limits assigned, marked and established to the gaol of the Home District by the justices of the peace in and for the said district in general quarter sessions assembled, according to law, by permitting him, the said James King, to go at large, upon and within the said limits as aforesaid; and took bail and security that he, the said James King, should not, at any time during his confinement under and by virtue of the said writ, at the suit of the said plaintiff, go and remove beyond the said limits; and on that occasion the defendants, on the day and year aforesaid, at Toronto, by their certain bond, did acknowledge themselves to be firmly bound to the said sheriff in the penal sum of one hundred and twenty pounds, to be paid to the said sheriff or his assignee, with a certain condition underwritten, that if the said James King, being in execution on the said writ, did and should during his confinement on the said writ remain within the limits prescribed for the gaol of the Home District aforesaid, and should not during his confinement go or remove beyond the same, &c., or, in the event of the said James King, at any time during such his confinement, going or removing beyond the said limits so prescribed as aforesaid, if the defendants, or either of them



did well and truly pay the said sheriff the sum of £63 12s. together with all fees, interest and damages that might accrue thereon, then the said obligation to be null and void, &c.

To this declaration the defendants filed a general demurrer; and on the argument contended that the bail bond was void—1st., because the justices in Quarter Sessions assembled had no authority to assign limits to the gaol.—2ndly, that the condition of the bond required more to be paid than the debt, interest and costs due by James King.—3rdly, that the breaches were insufficiently assigned.

SHERWOOD, J., delivered the judgment of the court.

By 8 & 9 Wm. III. ch. 17, sec.—the sheriff, &c., is directed not to allow prisoners in execution to go beyond the prison, on the rules of the same. By 11 Geo. IV. ch. 3, sec. 2, the justices of the peace in General Quarter Sessions shall assign and mark as limits to the gaol not more than 16 acres of ground contiguous to the gaol, and after the establishment of the limits it shall be lawful for debtors to be and remain on such limits without subjecting the sheriff to an action of escape. By 4 Wm. IV. ch. 10, sec. 1, the limits of gaols in towns are made co-extensive with the limits of the towns. By section 3rd., the extension of the gaol limits shall not make void any security theretofore given for the limits before established, but such security shall extend to the new limits. If a bond be given with a condition to do several things, and only some of them are against law, the bond shall be good as to the doing of the things agreeable to law, and only void as to those against law—Hob. 12, 1 Ven. 237, 2 Ld. Raym. 1456—that is, the common law; but it is altogether void, if part be against the statutory law.—Hob. 13, Zwyne's case (3 Co. 82-3), 5 Taunt. 727, 4 M. & S. 66, 6 Bro. P. C. 31.

When the justices of the peace assigned limits to the gaol of the district in this city does not appear by the declaration, nor does the extent of such limits appear; but, as the defendants contend that they assigned limits when they had no authority to do so, it must be presumed they assigned them



since the passing of the statute 4 Wm. IV. ch. 10, because they had authority before that time, by 11 Geo. IV. ch. 3, to assign gaol limits, which authority the 4 Wm. IV. abrogated. If the justices in General Quarter Sessions have assigned limits to the district gaol since that statute, it was an act of supererogation; but as the 4 Wm. IV. ch. 10 is a public act, it must be presumed the justices took official notice of it, and assigned the same limits as that act prescribes. With respect to the second objection—"that the condition of the bond requires more to be paid than the debt, interest and costs due by James King," it appears to us there is nothing tangible in it. The court cannot take judicial notice of the exact amount of the sheriff's costs; if he take too much the defendants have their remedy against him at law.

We also think there is nothing in the third objection—"that the breaches are insufficiently assigned;" and that the plaintiff is entitled to judgment.

Judgment for the plaintiff on demurrer.

**THANKFUL COLE V. GEORGE COLE AND ABEL COLE EXECUTORS OF ISAAC COLE, DECEASED.**

*Devise—Ademption.*

Where a testator had bound himself by bond to pay to his mother, £12 10s. 0d. annually, and devised part of his lands to his brothers on condition that they should pay to his mother £12 10s. 0d. per annum, and pay all his just debts, and made them his executors—

*Held*, that at law the legacy could not be considered as a satisfaction of the annuity on the bond, and that the mother was entitled to both.

This was a special case, in which the facts were stated by the attorney and counsel of the parties after issue was joined in the cause, under the authority of the 7th Wm. IV. ch. 3, sec. 17, in order that the court should express an opinion on the case, and by which the parties agreed to abide and adopt the proper proceedings to carry it into effect.

The question arose on the construction of a will. It appeared that the testator, Isaac Cole, and one Jonathan Fulford, by their joint bond, dated the 12th day of May, 1824, became bound to one Adam Cole and the plaintiff, Thankful Cole, his wife, (the father and mother of the tes-



tator), in the penal sum of £400, binding themselves, their heirs, executors and administrators, for the payment of the same, which bond was conditioned for the payment, by the testator, of £4 10s. 0d., to the said Adam Cole and the plaintiff, his wife, on the 10th day of March in each year after the date of the obligation, till the 10th day of March, 1831, if Adam Cole, or the plaintiff, should live so long; and the sum of £12 10s. 0d., on the 10th of March, 1831, and the like sum on the 10th of March in every succeeding year during the joint lives of Adam Cole and his wife, or of the life of the plaintiff. In the year 1832, Adam Cole and his wife, the plaintiff, brought an action of debt against the testator and Fulford, and recovered a judgment for the amount of £400, the penalty of the bond against them, and levied by writ of *Fi. Fa.*, £24 8s. 10d., being the amount of the instalments then due, together with costs and incidental expenses on that judgment.

Adam Cole died in August, 1832; Jonathan Fulford died in December, 1833; and Isaac Cole, the testator, died in August, 1836, after he had made and published his last will and testament, bearing date the 8th day of May, 1836, and attested by three witnesses; in which, among other bequests and devises, were the following—namely: “2ndly, all my honest debts to be paid by my executors. 3rdly, I give and bequeath to my beloved wife during her natural life, the one-third of all my real estate, and also the one-third part of all my personal property that I may be possessed of at my decease, after all of my lawful debts are paid by my executors.”

The testator then devised certain parcels of land, in fee, to his brothers George Cole and Abel Cole, and then subjoined the following condition:—“I do give and devise to my brothers George and Abel, on this express condition, that they pay or cause to be paid to my and their mother, the widow of my father the late Adam Cole, the sum of fifty dollars per annum during her natural life, and also all my honest debts that may be due my creditors at my decease.”

He then appointed George and Abel Cole his executors.



The testator paid all the instalments due on the bond up to the 10th day of March, 1836, and the plaintiff had received from the defendants, George and Abel Cole, the sum of £12 10s. 0d., under and by virtue of the will of the testator, ever since that time. The defendants contended that the intention of the testator in his will was, that the payment of the fifty dollars a year to the plaintiff, under the will, should be in full satisfaction of the fifty dollars which would become due to the plaintiff on the 10th day of March in every year during her life. The plaintiff, on the other hand, contended that the fifty dollars a year, which the testator directed in his will to be paid to her annually by the devisees of a certain part of his real estate, was intended as a voluntary legacy to her, and not as a satisfaction of the debt, which would thereafter fall due to her, according to the condition of the bond and the exigency of the payment entered upon it. The instalment on the bond which became due on the 10th of March, 1836, was paid; an instalment fell due on the 10th of March, 1837, and another one on the 10th of March, 1838, and the plaintiff had sued out a writ of *Sci. Fa.*, calling on the defendants to shew cause why execution should not issue in her favour to levy the amount of both of them. The defendants had paid the fifty dollars a year under the will to their mother the plaintiff, and pleaded to the *Sci. Fa.* a payment of the two instalments before stated as due on the bond, and relied on proof of the payment under the will to support their plea of payment on the bond, alleging that the testator, Isaac Cole, intended that the payment of the fifty dollars a year to his mother, as directed by the will, should satisfy each yearly instalment as it should become due on the bond.

The question for the court to determine was this, whether the bequest in the will of Isaac Cole to his mother of fifty dollars a year during her life, was to be construed as a satisfaction of the plaintiff's legal claim on the judgment entered on the bond.



SHERWOOD, J., delivered the judgment of the court.

It appears to be a general rule established in equity, that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, shall be considered a satisfaction of the debt.—1 P. W. 409; 2 ib. 132; 3 ib. 353; 1 Ves. 126. This is only a rule of construction, however, and it has often been set aside where the circumstances to be collected from the will are sufficient to repel any such presumption. The following exceptions to the rule, among others, seem to be fully established—namely: First, if the legacy be less than the debt, it shall never be considered as a part payment or satisfaction of it.—1 Ves. 263, Pre. Chan. 384. Secondly, the legacy is no satisfaction, if it be conditional.—2 Salk. 508; 2 Atk. 300, 491; 2 P. W. 555; 1 Ves. 519. Thirdly, a legacy shall not be held to be a satisfaction of a debt or covenant, unless it be equally beneficial in amount and certainty with the debt or duty contracted for by the debtor.—Pre. Chan. 236; 2 Vern. 478; 2 Atk. 300; 3 Atk. 96; 1 Bro. Ch. Rep. 129; ib. 295; 2 Ves. 635; 1 P. W. 409, *note* 1, and 324; 2 P. W. 614; 1 P. W. 299. Fourthly, where there is an express direction contained in the will for payment of both debts and legacies, the court will infer from that circumstance, that the testator intended both debt and legacy to be paid.—1 P. W. 408; 3 Atk. 65; 3 Ves. 466, 529.

We think the bequest in the will does not operate as a satisfaction of the debt which will yearly become due on the judgment, according to the condition of the bond, during the life of the plaintiff. The testator might have had that intention, but he has not expressed in his will that the sum which he directed to be paid to the plaintiff yearly during her life should be in satisfaction of the debt he owed her, and therefore the case must be determined according to the rules of decision in other analogous, or nearly analogous, cases.

The plaintiff, we think, could have no recourse on the personal estate of the testator, to compel payment of the legacy, in case George and Abel Cole, the devisees of the land which is charged with the payment of it, should



neglect or refuse to pay it, because the legacy is expressly given out of that estate and no other.—*Amesburg v. Brown*, (1 Ves. 477). The lands are devised to them by the testator upon the express condition of their paying this legacy, as well as all the debts the testator owed at the time of his decease; if the condition be broken, the plaintiff cannot enter into possession of the estate. The plaintiff has a legal remedy both against the real and personal estate for the recovery of each instalment as it becomes due on the judgment.

As the legacy is not so certain and of course not so beneficial as the debt, and as the real estate is made liable to the payment of debts as well as the legacy, we think the cases already cited under both these heads shew that the legacy would not be considered, even in a court of equity, as an ademption of the instalments annually due on the bond.

There is no legal interest, debt or duty, however, created by the will of the testator in favour of the plaintiff in this cause; if she has any claim on the defendants under the will, it must be wholly equitable; in consequence of the condition annexed to the devise in favour of the defendants, they may be considered as trustees for the plaintiff, and if the heir at law entered for breach of the condition, he might also be considered in the same character—1 Atk. 483, 1 Ves. 47, 423; but still the claim of the plaintiff is in equity, not in law. Her claim on the judgment is a legal claim, and a court of law is bound to allow it, unless some legal objection is shewn and sustained. She has a right to make an election, unless sustained by a court of equity, and we consider that court as the only form in which the question whether a legacy or other equitable claim should be adjudged an ademption of a legal demand, can be decided. There is no legal interest in a pecuniary legacy, and consequently no action at law can be sustained to recover it, and therefore it cannot be adjudged by a common law court as a satisfaction of a legal claim.—5 T. R. 690; 3 East 120.

We think, therefore, that the plaintiff has a legal right to



recover the two instalments due on the bond and judgment, and that execution should be awarded for the amount.

Judgment for the plaintiff.

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ASHLEY V. DUNDAS.

*False imprisonment.*

A private individual cannot arrest on suspicion of felony; he must show a felony committed.

This was an action of trespass and false imprisonment. The plaintiff was keeper of the prisoners confined in Fort Henry in the Midland District, at the time of the alleged grievance, and the defendant held the rank of lieutenant colonel in the army, and was then military commandant at Kingston and at Fort Henry. The plaintiff laid his damages at £1000. The first count in the declaration alleged that the defendant seized and laid hold of the plaintiff, and forced and compelled him to go into a certain dungeon, or guard-house, and kept and detained him there for twenty-four hours, without any reasonable or probable cause, and contrary to the laws of the province; whereby the plaintiff was bruised and wounded, and greatly prejudiced in his credit and circumstances. The second count was for an assault and imprisonment, and the third count was for a common assault and battery.

The defendant pleaded the general issue, and two special pleas; the plaintiff replied to the special pleas *de injuriâ*, and the cause went down to trial at the last assizes for the Midland District, when the plaintiff recovered a verdict for £200.

The defendant obtained a rule *nisi* for a new trial, on the grounds of the verdict being against law and evidence, and for excessive damages.

The special pleas of the defendant did not differ in the nature of the defence contained in them, and it is therefore only necessary to state the substance of the first, for the purpose of shewing the principal facts which the pleading rendered it incumbent on the defendant to prove in order to make out a defence to the action. It was to the following effect:—



“As to the assaulting and imprisoning the plaintiff in the first count of the said declaration mentioned, the defendant says that, before and at the time in the said declaration mentioned, the said defendant was a lieutenant-colonel in the army of her Majesty, and the officer commanding his Majesty's forces at Kingston and Fort Henry in the Midland District; and the defendant further saith that before the said time, by certain warrants under the hand and seal at arms, of his excellency Sir George Arthur, lieutenant-governor of the province of Upper Canada, and major-general commanding her Majesty's forces therein, directed to William Botsford Jarvis, Esq., sheriff of the Home District, to the sheriff of the Midland District, and to the officer commanding his Majesty's forces at Kingston, thirteen persons who had been convicted of the crime of high treason were ordered to be removed by the sheriff of the Home District to Kingston in the Midland District, and there to be delivered into the custody of the sheriff of the Midland District, who was thereby authorized and commanded to receive into his custody the bodies of the said persons, and safely keep them in such place of confinement as the officer of his Majesty's forces commanding at Kingston for the time being might assign for that purpose; and the said officer so commanding at Kingston was thereby required to be aiding and assisting the said sheriff in the secure keeping of the said prisoners for the offences aforesaid, until they should be delivered from his custody by due course of law; and the defendant further saith, that afterward and before the said time when, &c., to wit, on the third day of June last, the said prisoners were delivered by the sheriff of the Home District to the sheriff of the Midland District, and by him placed in a certain room in prison in Fort Henry, for safe keeping; and the said plaintiff was then and there placed in charge of the said prisoners, by the said sheriff of the Midland District, as the deputy, or gaoler of him the said sheriff, and for the safe keeping of the said prisoners; and the defendant further saith, that afterwards on the 30th day of July last, the said prisoners feloniously made their escape from the prison or room in Fort Henry, and from the said fort; and the said defendant further saith, that he, the said plaintiff, contrary to his duty, as the person in charge of the said prisoners, having neglected to examine the walls and doors through which the said escape was effected, and having negligently permitted divers instruments of iron, and plans of the passages of the said fort, and other articles to aid and assist the said prisoners in the said escape, to be introduced into the said prison, or room,



and delivered to the said prisoners, while in the care and custody of him the said plaintiff.

“Wherefore the said defendant, so being the officer commanding her Majesty’s forces at Kingston and Fort Henry, aforesaid, having good and probable cause of suspicion, and vehemently suspecting the said plaintiff of having been guilty of feloniously and traitorously aiding and abetting the said prisoners in their said felonious escape from the prison aforesaid, did at the same time when, &c., gently force and compel the said plaintiff to go to and in a certain guard-house in Fort Henry aforesaid, and there to remain until the said defendant applied to Anthony Monaghan, Esq., one of his Majesty’s justices of the peace in and for the Midland District, for a warrant founded on the reasons aforesaid, to apprehend the said plaintiff, and to retain him to answer to the said offence, in having negligently permitted the escape of the prisoners aforesaid, and authorizing and commanding any constable to apprehend the said plaintiff, and him safely keep, subject to bail and mainprize in the discretion of him the said Anthony Monaghan; and the said defendant further saith, that by virtue of the said warrant, the said plaintiff was, as soon as conveniently could be, to wit, on the day and year aforesaid, carried and conveyed in custody and delivered to the sheriff of the Midland District, to be dealt with according to law; and the said plaintiff was afterwards discharged out of the custody of the said sheriff, after having given bail for his appearance to answer the said charge; by means of the premises aforesaid, the said plaintiff was kept and detained in prison for the said named space of time in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid.”

The second plea of justification was the same as the first, except that the defendant stated the persons sent to the Fort as prisoners were indicted for high treason.

The facts that certain persons convicted of high treason were confined in Fort Henry, and were in the custody of the plaintiff, as the keeper of the district gaol of the Midland District, and that they feloniously escaped from the Fort, were admitted in the argument in banc, and at the trial. It remained then for the jury to consider—1st, whether the plaintiff negligently omitted to examine the walls and rooms of the prison so frequently as his duty required—2ndly, whether he negligently permitted instruments of iron, and



plans of the passages of the Fort to be introduced and delivered to the prisoners—3rdly, whether, from the whole evidence, they could arrive at the conclusion that the defendant had probable cause to suspect, and did suspect that the plaintiff aided and abetted the prisoners in their felonious escape.

SHERWOOD, J., delivered the judgment of the court.

What constitutes a probable cause is often a question of fact for the jury to decide. Mr. Starkie, in his treatise on evidence, part 3, page 426, remarks, that “this must, in principle, happen in all cases where the result depends on the combined effect of a variety of circumstances to which no particular rule or principle of law is applicable. The probable cause of suspicion must necessarily consist in the circumstances of the case, within the defendant’s knowledge, which tended to throw suspicion on the plaintiff. The existence of such circumstances and their force and tendency are questions rather of fact than of law; for the effect must be measured by sound sense and discretion rather than by any rule of law, which cannot measure mere probability. If such circumstances did exist, it is to be presumed the defendant rested upon them, but this is not to be conclusively presumed; for it seems to be clear that if, notwithstanding the existence of unfavourable circumstances, the defendant knew the plaintiff was innocent, he would be liable in damages, for as to him who was better informed the circumstances could afford no probable cause.”

In Sir Anthony Ashley’s case, reported in 12 Co. 72, it was resolved that “he who doth arrest must have suspicion upon probable cause, which may be pleaded, *and is traversable*”—that is, a person who arrests on suspicion of felony.

The replication of *de injuriâ* in the present case puts in issue not only the existence of probable cause of suspicion of felony, but also the existence of such suspicion in the mind of the defendant when he imprisoned the plaintiff. The jury, by their verdict, have most probably negatived



both. Supposing, however, the evidence clearly proved the fact of negligence, as stated in the defendant's plea, ought the jury to have inferred from the fact that the defendant had good and probable cause to suspect the plaintiff was an aider and abettor in the felonious escape of the prisoners? In order to take a proper view of this question, it is necessary to consider what acts make a person an aider and abettor in felony. To prove him an aider and abettor it must be shewn, either that he was actually present, and, in some way, assisting in the commission of the offence, or constructively present for the same purpose—that is, in such a convenient situation as readily to come to the assistance of the others, and with the intention of doing so should occasion require, the knowledge of which would of course give his confederates additional confidence in their enterprise.

If the evidence on the part of the defendant, therefore, clearly established the alleged negligence of the plaintiff, the other enquiry must necessarily follow—namely, whether such negligence as the defendant states in his plea formed a probable cause for suspecting the plaintiff of having been an aider and abettor in the felonious escape of the prisoners.

We are not prepared to say that the evidence adduced by the defendant established the existence of such negligence, or that it did not; but supposing it did, then we would not feel justified in saying the verdict is against evidence, and that such negligence necessarily formed a probable cause to suspect the plaintiff of the offence imputed to him by the defendant; it was a question within the peculiar province of the jury to decide, under all the circumstances of the case. As to the question of probable cause, this case appears analogous in principle to that of *Isaacs v. Broad et al.* (2 Stark 168), and *Brooks v. Warwick* (*ibid.* 389), in both of which Lord *Ellenborough* left the question to the judgment of the jury, with such comments on the law and the facts as appeared to be requisite.

As there was evidence on both sides in this case, and as the jury are the constitutional judges, under such circumstances, as to which scale preponderates, the present verdict



cannot properly be said to be contrary to evidence, nor do we think it contrary to law.—6 B. & C. 635 ; 5 Bing. 354 ; 2 C. & P. 565.

There is yet another point to be determined. The counsel for the defendant alleges the damages are excessive, and requires the case to be sent to another jury to be corrected in that respect. We certainly incline to think the damages are too large, but still we find it impossible to say they are so excessive as to warrant the interference of the court to set aside the verdict, under the authority of decided cases on that ground. The rule established by the court in the case of *Leith v. Pope* (2 Wm. Black. 1327) has been adhered to ever since. It is this, “that in cases of *tort*, the court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury: that is, unless they are outrageously disproportionate either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant.”

In a case like this, the jury have a right to take into consideration the circumstances which accompanied and gave a character to the trespass and imprisonment; the time, the place of confinement, the accusation, and the manner in which it was made. The jury are not limited in assessing damages to the mere corporal injury or primary loss of the plaintiff, but may, if they prefer, award exemplary damages in proportion to the illegal and improper conduct of the defendant.

In the present case, we think the defendant was wrong in sending the plaintiff to the guard-house in Fort Henry, where it appears from the evidence he did send him, and caused him to be confined for several hours. He might have been taken before a justice of the peace for examination, and there is no reason shewn or even alleged why he was not. It is the duty of a person arresting any one on suspicion of felony to take him before a justice of the peace as soon as he reasonably can, and the law gives no authority even to a justice of the peace to detain a person suspected but for a reasonable time, till he may be examined—4 B. & C. 597.



There could be no pretence for saying a justice of the peace could not be conveniently found, for there were two or three justices at Fort Henry when the plaintiff was arrested; they were there on public business; and the defendant might have caused the plaintiff to be taken before one of them, or some other justice residing in the town of Kingston, which is a very short distance from Fort Henry.

Upon the whole, we think we should not be warranted in distrusting the verdict in this case, upon any established principles of law relative to the granting of new trials in cases of *tort*, and we are therefore of opinion the rule should be discharged.

Rule discharged.

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# A DIGEST

OF THE

## CASES REPORTED IN THIS VOLUME.

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### ABATEMENT (PLEA IN.)

See PRACTICE, 5 & 8.

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### ABSCONDING DEBTOR.

See ATTACHMENT, 5.

1. An absconding debtor returning to the province after verdict and before judgment is entitled to a re-hearing, by the granting a new trial. *Robertson et al. v. Burk*, 75.

2. The statute 2 Wm. IV. ch. 5 gave a priority to the creditor suing out the first attachment under which the sheriff seized the goods of an absconding debtor, to have his debt satisfied out of the goods so seized in preference to other creditors also suing out attachments, and who might obtain judgment and execution before such first attaching creditor, where there was no *laches* or culpable or fraudulent delay in the proceeding to judgment on the part of such first attaching creditor. *Gamble and Birchall v. Jarvis, Esq., Sheriff*, 271.

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### ACCEPTANCE.

See BILLS OF EXCHANGE, 9.

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### ACCOMMODATION.

See BILLS OF EXCHANGE, 3 & 6.

### ACCOUNT STATED.

See BILLS OF EXCHANGE, 13.

A plaintiff may recover on an express promise to pay a specific sum, though such promise were made on the occasion of presenting the account due to the defendant; no admission of which account could, according to the statute 2 Geo. IV., ch. 13, be received in evidence, the account rendered being in New York currency, and the books from which the account was taken being also kept in that currency. *Crooks et al. v. Law*, 306.

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### ADEMPITION.

See DEVISE, 1.

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### ADMINISTRATOR.

See EXECUTOR.

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### AFFIDAVIT.

See ATTACHMENT, 1 & 5.

*Jurat.*]—When a *jurat* to an affidavit made by two persons does not state that both were sworn, an amendment will be allowed by the insertion of their names. *Fisher v. Thayer*, 513.



## AFFIDAVIT TO HOLD TO BAIL.

See ARREST, 1 & 4.—ATTACHMENT, 5.—CA. SA., 1.—MALICIOUS ARREST, 1.

The ordinary conclusion to an affidavit to hold to bail, "that he does not sue out &c. from any vexatious or malicious motive," is not necessary in an affidavit to obtain a judge's order to hold to bail. *McLachlan v. Wiseman*, 333.

## AGENT.

See EVIDENCE, 5.

## AGREEMENT.

See ASSUMPSIT, 1.—CONSIDERATION, 1.—EXECUTOR, 4.—LIEN, 1.—LINE FENCES, 1.

## ALIEN.

A person who was born in the United States before the Revolution, and has continued to reside there since, is an alien, and cannot maintain ejectment in this country. *Doe ex dem. Paterson v. Davis*, and *Doe ex dem. Patterson v. Dewitt*, 494.

## ALLOWANCE OF BAIL.

See BAIL, 3.

## AMENDMENT.

See AFFIDAVIT, 1.—PRACTICE, 6.

*Appeal.*—A record was amended in matter of form after an appeal to the King in Council. *Rowand v. Tyler*, 500.

## ANNUITY.

See DEVISE, 1.

## APPEAL.

See AMENDMENT, 1.—QUARTER SESSIONS, 1.

## ARBITRATION AND AWARD.

See ATTACHMENT, 1.—COSTS, 3.—JUDGMENT, 1.

1. Debt on award to pay money on or before the first of April. Breach, that the said defendant did not pay on the said 1st day of April in the said award in that behalf mentioned, held good on general demurrer to the declaration. Notice of an award need not be averred. *Turner v. Alway*, 45.

2. In debt on bond conditioned to perform an award, a plea setting forth mere legal grounds of objection to the award and tendering an issue to the country, is bad. If the award consists of two separate parts, defendant cannot plead in bar of the whole any matter which answers only one part; and if plaintiff in his replication to a plea of no award assigns two breaches, he is entitled to judgment on a general demurrer, though only one of them be sufficiently assigned. *Boyd and Reid v. Durand, Administrator, &c.* 122.

*Construction of—Mill-dam.*—3. Where arbitrators, to whom disputes, arising from the over-flowing of three acres of the plaintiff's land by water thrown back by the defendant's mill, were referred, awarded damages to the plaintiff for the injury, and that the defendants should have a full fall of nine feet and no more, for their mill-dam, provided that the water on the plaintiff's land was not raised thereby, and the defendants raised their dam to nine feet and overflowed five acres more of the plaintiff's land: *Held*, that the award did not prevent his recovery of compensation for such further injury, and that he was entitled to damages for the additional five acres. *Casler v. Ransom et al.*, 513.

*Repugnancy.*—4. An award that the defendant should pay the plaintiff



a certain sum, including the costs of the reference, and afterwards directing that each party should pay half the same costs, is bad for repugnancy. *Shaver v. Scott*, 575.

### ARREST.

See BAIL, 7.—FALSE IMPRISONMENT, 1.—SHERIFF, 3.

1. A judge of a district court has no authority to order an arrest, upon an affidavit which disclosed a cause of action founded on a contract, on which the damages were unliquidated. *Ferris v. Dyer et al.*, 5.

2. When a defendant, being in custody on mesne process, put off the trial at one assizes, and at the approach of the following assizes—after being apprised that the plaintiff had neglected to give notice of trial—pressed that the record might be entered low on the docket to give him time to procure a witness, and it was so entered, but could not be tried for want of time: *Held*, that defendant was not supersedable, because the cause had not been tried within three terms. *Gordon v. Fuller*, 34.

*Liability of defendant once discharged to be arrested again on the same judgment.*—3. A defendant discharged from custody by *supersedeas*, the plaintiff not having charged him in execution in due time, cannot be arrested again on the same judgment. *Burn v. Straight*, 523.

*Affidavit to hold to bail—Irregularity in arrest—Special bail no estoppel—Endorsement.*—4. An affidavit of debt against the endorser of a promissory note or drawer of a bill of exchange, must state the default of the maker or acceptor. Where a defendant puts in special bail to an *alias* bailable writ, he is not thereby prevented from objecting to any irregularity in the arrest. *Quere*, whether an *alias* bailable writ need not be

endorsed. Where the objection taken to an affidavit to hold to bail was new in this court, and the plaintiff followed a form given in Tidd's Appendix, the arrest was set aside without costs, and on condition that no action should be brought. *Ross et al. v. Balfour et al.*

*Privilege.*—5. A person who having attended as a grand juror at a court which adjourned for a few days, went into another district on private business, was held not to be privileged from arrest there during such adjournment. *Mittleberger et al. v. Clark*, 718.

*Discharge of one of two joint defendants.*—6. The discharge of one of two defendants in execution on a joint judgment operates as a discharge of both. *Fisher v. Patton et al.*, 741.

### ARREST OF JUDGMENT.

Judgment cannot be arrested after judgment is given on demurrer. *Wragg v. Jarvis*, 290.

### ARSON.

See LIBEL, 3.

### ASSAULT.

See PLEADING, 7.

*Joint liability of defendants.*—In an action for assault in which the verdict was against two defendants, it was held that a second defendant was liable for damages equally with the first, though the principal injury was caused by the latter. *Denham v. Powell et al.*, 675.

### ASSESSMENT.

See PRACTICE, 1.

### ASSUMPSIT.

See BILLS OF EXCHANGE, 2.  
In assumpsit for work and labor,



when there is a written agreement fixing the price, such agreement must be produced on the trial of the cause, unless it has been rescinded. *Wallen v. Mapes*, 96.

### ATTACHMENT.

See ABSCONDING DEBTOR, 2—FI. FA., 2.

1. The court will not grant an attachment for non-payment of money pursuant to an award, which has been demanded under a power of attorney, unless the affidavit of demand shew that it has been made after the time appointed for paying the money. *Barnes v. McMartin*, 143.

2. Where an attachment against a sheriff has been set aside for irregularity, with costs, the court delayed issuing another attachment, to give time for payment of those costs. *The King v. Ruttan, Sheriff*, 154.

3. An attachment will not be granted on the order of a judge at Nisi Prius, until such order is made a rule of court. *Plumb v. Miller*, 484.

4. When an attachment was obtained against a sheriff for not returning a writ after a settlement of the plaintiff's claim before the rule issued, the attachment was set aside, but without costs, as the sheriff should have come in and applied to set aside the rule. *Pelton v. Administrators of Wells*, 485.

5. *Affidavit.*]—The court will only grant an attachment under the Absconding Debtor's Act, for sums certain, when such an affidavit could be made as would enable a plaintiff, without a judge's order, to sue out bailable process. *Clock v. Alfield*, 504.

### ATTAINDER.

The property of a person attainted for high treason is not forfeited until

the attainder is complete. *Quære* as to the effect of a defendant becoming attainted between the seizure and sale of his goods under a *Fi. Fa.* *Eastwood et al. v. McKenzie*, 708.

### ATTORNEY.

See ARREST, 1.—BAIL, 1.—COSTS, 1.—PRACTICE, 3.—TENDER, 1.

1. The court will not proceed summarily against an attorney on a charge of malpractice, where the conduct of the attorney is merely inadvertent and the complainant has his remedy by action. *In re Stuart, one, &c., on the complaint of Busted*, 68.

2. Where the agent of a client paid an attorney's bill—objecting to some items, but unable without paying it to get papers out of the attorney's hands, the court, considering some charges to be unreasonable, ordered a taxation. *Doe ex dem. v. Eaglesum*, 77.

3. Where the plaintiff, an attorney, brought assumpsit and recovered 3s. the court held him entitled to full costs, as he proved a cause of action to the amount of £20 and upwards, although the jury decided against him on those items of his claim on hearing the whole evidence. *King, one, &c. v. Such*, 81.

4. An attorney may maintain an action for his fees in a cause which he does not bring to a conclusion, if he can account satisfactorily for not proceeding. After a verdict has been given the court will not order the plaintiff's bill to be referred for taxation. *Ford et al. v. Spafford*, 440.

5. The court will not grant an order to compel an attorney to pay to a complainant compensation for the latter's trouble and expense incurred in compelling the attorney to pay over monies collected by him for the complainant. *McDonough v. Campbell*, 589.



BAIL.

See ARREST, 1.—CA. SA., 1.—  
ESCAPE, 3.—PLEADING, 4.

1. Defendant was arrested and gave common bail—who, to relieve themselves, put in special bail. The attorney gave notice and signed himself “defendant’s attorney,” and all the subsequent papers in the cause were served on him. Judgment was obtained and defendant arrested on a *Ca. Sa.*, when it was shewn that the defendant had never employed the attorney. The court set aside the whole proceedings. *McMartin v. McKinnon*, 72.

2. Bail will be allowed on the affidavit of justification taken at the time the bail-piece was acknowledged—although an exception be entered—where nothing is shewn to repel such affidavit, or to impeach their solvency. *Duggan v. Derrick*, 75.

3. Rule for allowance of bail on the affidavit taken before the commissioner refused where it was shewn on affidavit that one of the bail had, since making such affidavit of justification, absconded. *Billings et al. v. Loucks*, 78.

*Plea, that they did not become bail—Variance.*—4. A plea by bail to an action on their recognizance that they did not become bail, concluding to the country, is bad on special demurrer; and on pleas of *nul tiel* record to the judgment and no *Ca. Sa.*, a judgment varying in the term from that stated in the declaration and a *Ca. Sa.* in form of action different from that stated in the replication, constitute a fatal variance. *Burns v. Grier and Campbell*, 501.

*Enrolment of recognizance neglected until after plea of nul tiel record—Costs.*—5. When a recognizance is not enrolled until after *nul tiel* record pleaded, the plaintiff must pay the costs of the defendant’s plea, and the

defendant be at liberty to plead *de novo*. *Smith v. Moreton*, 551.

6. A bail-bond conditioned that the defendant shall enter special bail at the return of the writ, or surrender himself to the sheriff, is bad, though the first part of the condition alone would be good. *Wilson v. McCulloch*, 680.

*Justice of the Peace.*—7. Although a statute may require the presence of three justices to convict of an offence, yet one has power to bail the offender; and a second arrest for the same charge, by the same complainant, before the time appointed for the hearing, is illegal. *King v. Orr*, 724.

BARGAIN AND SALE.

See DEED, 1 & 2.

BEARER.

See BILLS OF EXCHANGE, 5.

BILLS OF EXCHANGE AND  
PROMISSORY NOTES.

1. A promissory note made payable at a particular place must be presented for payment at that place on the day on which it falls due, or the holder cannot recover. *Truscott et al. v. Lagourge*, 134.

2. In assumpsit to recover a promissory note, the declaration contained the common money counts only.—Judgment having gone by default, the plaintiffs on assessing damages proved that a copy of the note was attached to the declaration filed and to the copy sent to the sheriff to be served, without proving defendants’ signature: Held sufficient. *Saxon and McKnight v. McFarlane et al.*, 142.

3. The court will not receive secondary evidence of a promissory note where a party to whom one witness swears he had enclosed it is not called



to account for it, though such party is an attorney's clerk, and it was enclosed to him in the course of business, and the attorney himself swears he has searched his office for it in vain, and believes it to be lost or mislaid. *Grover v. Clark and Clark*, 218.

*Second indorser paying note and afterwards suing prior indorser.*—4. A second accommodation indorser, who has paid a promissory note discounted at a bank for the benefit of the maker, may maintain an action on the note against a prior accommodation indorser, and may indorse it over after it is due. *Breeze v. Baldwin*, 444.

*Bearer--Declaration.*—5. In a declaration by the holder of a promissory note payable to bearer, it is not necessary to aver that the note was assigned over and delivered to the plaintiff. *Duggan v. Borland*, 461.

*Accommodation—Money lost.*—6. Where the plaintiffs, who were bankers, requested the defendant to draw two bills on England for their accommodation, which he did, and the plaintiffs endorsed and sold them here, giving the defendant a draft of the same amount payable in England, to meet them when due, and the defendant, for that purpose, transmitted the draft to the drawee of the bills, an officer in the customs, by whom it was discounted before it became due, and the money placed by him with the public monies left in his charge, from whence part of it was stolen; and, in consequence, one of the defendant's bills came back protested, and was paid by the plaintiffs on the defendant's check, they being his bankers, and afterwards charged to him in account: *Held*, that although it was an accommodation transaction, the drawee was the agent of the defendant and not of the plaintiffs, and that the defendant was responsible to them for the amount

of the bill. *Truscott et al. v. Billings*, 529.

*Computation on foreign bills.*—7. A foreign bill may be referred to the Master for the computation of the principal, interest, and costs, and ten per cent. damages under the provincial statute. *Commercial Bank v. Allan et al.*, 574.

*Illegal contract.*—8. *Held*, that money paid on a promissory note given for the value of goods which were to have been smuggled into the province, could not be recovered back in our courts. *Anguish v. House et al.*, 642.

*Acceptance—Money received.*—9. A defendant cannot be charged as an acceptor of a bill that has already been accepted, though conditionally, by the drawee; and to make him liable for money received, it must be shewn that he did receive money which he could and ought to have applied to paying the acceptance. *Spalding v. McKay*, 656.

*Renewal note not used as such—Liability of indorser thereon.*—10. A promissory note which had been intended as the renewal of another note, but which had not been so used, but had been left in the maker's hands with an indorser's name upon it, and was received by the plaintiff from the maker for a valuable consideration before it became due:—the indorser was held liable on such note. *Larkin v. Wiard*, 661.

*Presentment of, after date, before due.*—11. It is not necessary to present a bill of exchange, drawn payable after date, for acceptance before it be due; and where a bill is made payable at a particular place, presentment there for payment on the day it falls due is sufficient to charge the drawer, or to enable the person who took the bill to sue on his original cause of



action. *Richardson et al. v. Daniels et al.*, 671.

*Parol evidence to alter.*]—12. Parol evidence cannot be received to show that a bill of exchange accepted, payable three days after sight, was not to be paid until a further time had elapsed. *Bradbury v. Oliver*, 703.

*Account stated.*]—13. A promissory note must be for money and payable at some specific time, or on a contingency which must happen. A document which acknowledges a sum due at the time of its date, though payable on a future contingency, though not a promissory note, is evidence of an account stated, *Russell v. Wells*, 725.

*Commission — Usury.*] — 14. A commission of  $2\frac{1}{2}$  per cent. on drawing and accepting bills of exchange is usurious; and will not be allowed. *Bradbury v. Holton*, 735.

## BOND.

See ARBITRATION AND AWARD, 2.—  
BAIL, 6.—EJECTMENT, 2.—EXECUTOR, 3.—NEW TRIAL, 2.—PLEADING, 8.—PRINCIPAL AND SURETY, 1.

1. Debt on bond—the condition wanted the formal conclusion, “then this obligation to be void, &c.” Defendant, after oyer, pleaded the non-performance of a condition precedent by plaintiff. *Held*, such plea was a good bar to the action, notwithstanding the omission in concluding the condition. *Day v. Spafford*, 57.

*Bond for a deed—Tender and refusal—Delivery.*]—2. In a bond for a deed, where the condition required that a deed should be “executed and delivered” before a certain day: *Held*, that the due execution of the deed before the day, and forwarding it to a third party for the obligee, though it was not received until after the day, was a sufficient delivery under the

terms of the bond. *Muirhead v. McDougall et al.*, 642.

*Bond to the limits.*]—3. In a declaration on a bond to the limits, an averment that the Justices in Quarter Sessions assigned limits to the gaol is sufficient on general demurrer, and the bond is not avoided altogether because part of the condition is contrary to the statute. *Stebbins v. O’Grady et al.*, 742.

## BREACH OF PROMISE OF MARRIAGE.

See COSTS, 4.

## BY-LAW.

*Corporation.*]—1. Under the act of the legislature incorporating the town of Port Hope, the corporation have power to enforce regulations preventing cattle, swine and other animals from running at large by impounding and selling them, as well to liquidate damage occasioned by their so doing as a fine imposed. *Smith v. Riordan*, 647.

## CA. SA.

1. In a joint action against two, one was held to bail and afterwards absconded. Judgment being entered, it was held that the plaintiff might issue a *Ca. Sa.*, against both defendants, so as to charge the bail of the one who had been arrested, but not using it against the other without a new affidavit against him, as required by the statute. *McIntyre v. Sutherland et al.*, 153.

*Prisoner — Discharge.*] — 2. In a case where two defendants were in custody on a joint execution, and the plaintiff having come to an arrangement with one defendant, discharged him: *Held*, that the discharge of the one defendant operated as a discharge



of the other. *Leahy v. McFarlane et al.*, 688.

### CERTIORARI.

1. The court will not give any direction as to how a plaintiff must proceed, who removes his cause from the district court into the K. B. by certiorari. *Copping v. McDonell*, 311.

2. The court set aside a writ of certiorari, which issued to remove proceedings from a district court after judgment and execution, and without any application to this court or a judge, laying any especial ground. *Douglas v. Hutchinson*, 341.

### CHATTEL.

See SEIZURE, 1.

### COGNOVIT.

Defendant gave a cognovit with leave to issue execution; at the foot was a memorandum signed by plaintiff, deferring payment of part of the debt to a day subsequent to that fixed for the issuing execution. The plaintiff issued a *Fi. Fa.* for the whole on the first day; and the court made absolute a rule for restraining the levy according to the terms of the memorandum, with costs. *Fisher et al. v. Edgar*, 141.

### COMMISSION.

See BILLS OF EXCHANGE, 14.

### COMMISSION TO EXAMINE.

If a commission to examine witnesses abroad, issued at the instance of one party and executed at his expense, be returned by the commissioners into court according to the statute, the opposite party has a right to call for and make use of the evidence at the trial of the cause. *Semble*, that

an order for the publication of the evidence may be obtained before trial. *Gordon v. Fuller*, 174.

### COMMON COUNTS.

See BILLS OF EXCHANGE, 2.—NON-SUIT, 1.

A plaintiff who fails on the special counts of his declaration, will not be allowed afterwards to resort to common counts, *Holden v. McCarthy*, 99.

### COMPUTATION.

See BILLS OF EXCHANGE, 7.

### CONSIDERATION.

*Held*, that no action would lie on the agreement (given below)—1st, from the want of consideration; 2ndly, because the contract was usurious on the face of it.

"Toronto, 12th March, '35.

"Captain Hugh Stewart,

"Sir,—I have this day received from you the sum of two hundred and sixty-five pounds currency, and for which sum I have given my promissory note to you payable in twelve months from this date, the original sum being £250, and six per cent. interest makes up the amount to £265; and notwithstanding that you have accepted of my promissory note at the above date, it is perfectly understood between us that should you require the money before the expiry of the said period, I shall instantly repay the whole amount."

(Signed) "RICHARD RENNIE."  
*Stewart v. Rennie*, 151.

### CONTRACT.

See PARTNERSHIP, 2.

### CONVERSION.

See TROVER.



CONVEYANCE.

See DEED.—EJECTMENT, 2.—ESTOPPEL, 1.

CORPORATION.

See BY-LAW, 1.

COSTS.

See ATTACHMENT, 2, 4.—ATTORNEY, 3.—BAIL, 5.—NEW TRIAL, 10.—SET OFF, 1.

*Attorney.*]—1. Where a plaintiff, an attorney, brought assumpsit and proved a cause of action to £20, he was allowed full costs, although the jury rejected all his claim but three shillings. *King v. Such*, 81.

2. When a trial was put off by defendant on payment of costs, and such costs being unpaid plaintiff tried the cause and defendant obtained a verdict—the court refused to set off the costs of putting off the trial against the ultimate costs of the cause, there being no affidavit that the defendant was insolvent. *Potts v. Doyle*, 97.

3. Where a cause was referred to arbitration, costs to abide the event, and it appeared that the arbitrators allowed the item charged, reducing the price only (it being an account for medicine and attendance), and gave £10, the court refused to restrain costs under the Court of Requests Act. *Stratford v. Sherwood, one, &c.* 169.

4. In an action for breach of promise of marriage, though the jury give only one shilling damages, plaintiff is entitled to full costs. *Jeffrey v. Lawrence*, 317.

5. In slander, the general issue only being pleaded, the jury found for the plaintiff 1s. damages, “and full costs of suit.” *Held*, that the plaintiff had a right to tax his full costs. *Skinner v. Mair*, 337.

6. When a certificate for costs has

been ordered at the trial but not completed from inadvertence, the judge may afterwards complete it. *Linfoot v. O'Neill*, 343.

*Issues in fact and in law*—Some found for plaintiff and others for defendant.]—7. Where there are issues in fact and in law, and the issues in fact and one issue in law are in favour of the plaintiff and an issue in law in bar of the action in favour of the defendant, the plaintiff is entitled to the costs of trial and of the pleading determined in his favour, and the defendant to the general costs of the cause.—*Davis v. Davis*, 453.

*District Court.*]—8. Where the plaintiff's claim is within the jurisdiction of the District Court, it is no ground for a certificate for full costs that the defendant's set off could not be tried in the District Court. *Gooderham v. Chilver*, 496.

*Promissory note originally beyond jurisdiction of inferior court.*]—9. When the amount of a promissory note, originally beyond the jurisdiction of the district courts, had been reduced within that jurisdiction by payments before action brought, full costs were refused. *Donnelly v. Gibson*, 704.

COVENANT.

See DAMAGES, 1.—LEASE, 1.—PLEADING, 2.

Where the plaintiff declared on an indenture of lease, not setting out any covenant for quiet enjoyment (the lease itself in fact containing none,) and assigned as a breach that the defendant had hindered the plaintiff from entering on the demised premises at the time when the term commenced, and hath continually since kept him out; to which, the defendant pleads merely a denial of having hindered the plaintiff from entering and enjoying; and the jury on this issue found for the plaintiff: the court refused to set aside



the verdict—holding that there was an implied covenant for quiet enjoyment, and that proof of the defendant's refusing to give possession to the plaintiff amounted to a breach of it. *Smart v. Stuart*, 301.

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### CREDITOR.

See ABSCONDING DEBTOR, 2.

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### CRIMINAL LAW.

See FALSE IMPRISONMENT, 1.

A person who has been convicted of a capital felony at a court of oyer and terminer, may be brought up into this court to receive sentence. *The King v. Patrick Kenrey*, 317.

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### CROWN GRANT.

See ESTOPPEL, 1.

1. The plaintiff obtained a lease under the great seal for a lot of land, and finding plaintiff in possession as an intruder, gave him notice of a lease and requested him to leave the lot. Defendant afterwards cut off some valuable timber, for which act plaintiff brought trespass. *Held*, that plaintiff could recover without further proof of entry. *St. Leger v. Manahan*, 89.

2. If a party relies on a patent from the crown to make out his title, he should, in the event of its being mutilated or injured so as to render it impossible to ascertain its contents satisfactorily, obtain an exemplification. *Goodtitle ex dem. Snyder v. Barker*, 333.

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### CUSTOMS.

See SPIRITUOUS LIQUORS, 1.

### DAMAGES.

See ARBITRATION AND AWARD, 3—  
ASSAULT, 1.—DISTRESS, 1.—  
DOWER, 2.

When A. purchased a lease from B., and B. covenanted with him to repurchase at the end of three years for a greater price than he paid, and after the three years had expired A. tendered an assignment of the lease, which B. refused: *Held*, that in an action on the covenant, A. was entitled to recover as the amount of damages the price agreed on by B. for the re-purchase. *Gibson v. Cubitt*, 711.

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### DEBT.

See ESCAPE, 1.

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### DEED.

See SHERIFF'S DEED, 1.

1. A deed poll will operate as a bargain and sale; and the statute 4 W. IV. ch. 1, sec. 47, has a retrospective operation, so as to make deeds of bargain and sale executed before the act valid without registry. *Rogers et al. v. Barnum*, 452.

2. When the husband of a feme, seised of lands in her own right during the coverture, signed a writing (not sealed) acknowledging that he had bargained and sold certain lands, and been paid in full for them, and afterwards, by letter, directed his name to be signed to a deed of the same land, which was done, the wife not complying with the requisites of the statute to depart with her estate, and the vendee entered and continued in possession as owner upwards of twenty years: *Held*, that the jury who tried an ejectment, brought by such husband, might presume a conveyance from him, and that during his life, at least, no ejectment could be sustained to dispossess the vendee or those claim-



ing under him. *Doe ex dem. Wilson et ux. v. Wessells*, 282.

### DEMAND OF POSSESSION.

See EJECTMENT, 7 & 8.

### DEMURRER.

See ARBITRATION AND AWARD, 1 & 2.

—BAIL, 4.—EXECUTORS, 1.—PLEADING, 5.

### DESCRIPTION.

See SURVEY, 1.

### DEVISE.

See LEGACY.

*Ademption.*]—Where a testator had bound himself by bond to pay to his mother £12 10s. 0d. annually, and devised part of his lands to his brothers on condition that they should pay to his mother £12 10s. 0d. per annum, and pay all his just debts, and made them his executors: *Held*, that at law the legacy could not be considered as a satisfaction of the annuity on the bond, and that the mother was entitled to both. *Thankful Cole v. George Cole and Abel Cole, Executors of Isaac Cole, deceased*, 744.

### DISCHARGE.

See ARREST, 3.—CA. SA., 2.—INSOLVENT, 2.

### DISSEISIN.

See INTRUSION, 1.

### DISTRESS.

See REPLEVIN, 1.

In case for illegal distress, the plaintiff is entitled to succeed on shewing that there was no such appraisalment

as the law directs, even though but for nominal damages. *Maguire v. Post*, 1.

### DISTRICT COURT.

See CERTIORARI, 1 & 2—COSTS, 8 & 9.

### DOWER.

1. In dower, the summons, if served on the tenant, need not be served on the premises. *Honsburg v. Fritz*, 73.

*When damages recoverable—Plea of ne unques seisie—Evidence.*]—2. In dower, the demandant is entitled to damages only when the husband died seised. Under the plea of *ne unques seisie*, possession by the husband is *prima facie* evidence of a seisin in fee. *Lockman v. Nesse*, 505.

### EJECTMENT.

See ALIEN, 1.—DEED, 2.—MORTGAGE, 2.—NEW TRIAL, 2.—RELIGIOUS SOCIETY, 1.

1. Ejectment as on a vacant possession. It was shewn that there was a house on the premises and some articles of furniture therein, and that the tenant lived near. The court set aside the proceedings on condition that the applicant, who claimed title as landlord, should appear and defend. *Popplewell ex dem. Capreol v. Abbott*, 61.

2. Where A., having only a bond for a deed, and not having paid all the purchase money, made a conveyance in fee to B. and died, and B. went into possession of the land, and continued in possession for several years, when A.'s administrator obtained a conveyance in fee to himself, from the person who had given A. the bond: *Held*, that the administrator, by making use of the deed, was guilty of a fraud, and that his title under it could



not prevail against B. *Doe ex dem. Dobie v. Vanderlip*, 61.

3. Service on a person (not shewn to be a servant of the tenant) on the premises claimed in ejectment, explaining the meaning and intent thereof, held insufficient without shewing the tenant had received it. *Doe ex dem. Smith v. Roe*, 306.

4. Tenants in common cannot make a joint demise in an ejectment. *Doe ex dem. McNab et al. v. Sieker*, 323.

5. Service of a declaration in ejectment on any person but the tenant or his wife is insufficient, unless it can be shewn that the declaration came to the tenant's knowledge before the first day of term. *Doe ex dem. Gray v. Roe*, 483.

6. When a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession. But where the defendant went to the heir and offered to pay him the money due on the bond, and to take a deed from him as heir, it was held that by such conduct he had waived his right to a demand. *Doe ex dem. Lemoine v. Vancott*, 486.

*Demand of possession—Action by grantee of the Crown against locatee.*]

—7. A person holding land under a license of occupation from the Crown is entitled to a demand of possession before ejectment brought by a grantee of the Crown in fee. *Doe dem. Green v. Friesman*, 661.

## ENDORSEMENT.

See ARREST, 1.

## ESCAPE.

See PLEADING, 1.—SHERIFF, 3.

1. In debt for an escape, the sheriff cannot plead satisfaction previous to the issue of the writ in bar of the

action. Such plea is bad on general demurrer, and by pleading such defence he waives an objection to the declaration, (viz., that the judgment being in a district court, no affidavit was averred to warrant the issuing of the *Ca. Sa.*), which would have otherwise prevailed. *Munson v. Hamilton, Esq., Sheriff*, 118.

*Liability of new sheriff for escapes at the time of his appointment.*—2. On the death of a sheriff his deputy is charged with the execution of his office until a new sheriff is appointed, and he must assign over by indenture as well the debtors on the limits as those in custody; and a new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment, without such assignment. *McPherson and others v. Hamilton*, 490.

*Bail-bond—Form of condition—Action for escape—Against whom to be brought.*—3. An action for an escape will not lie when a valid bail-bond has been taken. Such action must be brought against the sheriff, and not against the bailiff, unless the act complained of amounts in effect to a rescue. *Wilson v. McCullough*, 680.

## ESTOPPEL.

*Conveyance in fee by nominee before patent—Conveyance after patent to another party.*—1. A nominee of the crown before the issuing of letters patent made a conveyance in fee to one person, after which the patent was issued to him, and he then conveyed to another, who again conveyed. *Held*: that the patentee of the crown and his assigns, as privies in estate, were estopped by the first conveyance, and that the patent fed the estoppel and made it a vested interest, confirming the case of *Doe dem. Hennessy v. Myers*, 2 O.



S. 424. *Doe ex dem. Tiffany v. McEwan*, 598.

### EVIDENCE.

See ACCOUNT STATED, 1.—BILLS OF EXCHANGE, 3 & 12.—COMMISSION TO EXAMINE, 1.—CROWN GRANT, 1.—DOWER, 2.—NUISANCE, 1.—QUARTER SESSIONS, 1.—REPLEVIN, 1.—SHERIFF, 1.

1. The statute 5 Geo. II. ch. 7, sec. 1, respecting affidavits to be made in England for proof of debts sued for in this province, is not repealed by the provincial statutes regulating the introduction of the law of England, or of evidence. *Quere*—If such affidavit made before a suit is commenced can be read at a trial subsequently had; or, if such affidavit must be entitled in the cause. *Gordon v. Fuller*, 174.

*Admissibility of copies of exhibits.*]—2. Sworn copies of exhibits filed in the Crown office cannot be received in evidence; the originals should be produced. *Molson et al. v. McDonnell*, 441.

3. M., formerly deputy sheriff of the L. district, sued R. the sheriff, for services in the execution of his office. At the trial the plaintiff produced an order drawn on him by the defendant in favor of one Rolph, desiring him to pay the latter £50 out of the monies he had received for sheriff's fees. *Held*, that in absence of any further information, the mere proof of the payment of that order did not entitle the plaintiff to recover. *Moore v. Rapelje*, 441.

*Credits.*]—4. A plaintiff is not bound by credits given by him in account on the mere statement of the defendant, but may reject such credits, unless the defendant can shew that they ought to be allowed. *Gordon et al. v. Fuller*, 576.

*Agent.*]—5. A document executed by an agent in the name of his principal can be proved by the same evidence which would be sufficient to prove its execution by the principal. *Dickson v. Jarvis*, 694.

### EXECUTION.

See ARREST, 3.—POUNDAGE, 1.

1. The court will not order that execution shall issue on a judgment for the benefit of a third party, a stranger to that judgment. *Gamble et al. v. Bussell*, 339.

*Term for years.*]—2. A term for years cannot be sold under an execution against lands and tenements. *Doe dem. Court v. Tupper*, 540.

### EXECUTORS.

See LEGACY, 1.—NEW TRIAL, 8.

1. Plaintiff in his declaration described himself administrator, &c., and laid causes of action accruing to him, administrator, as aforesaid. Defendant pleaded *ne unques* administrator. *Held*, bad on general demurrer. N. B.—there was no profert of letters of administration. *Walker, Administrator, v. Covert*, 58.

2. Leave to sue on a bond given to the Lieutenant Governor for the time being, as judge of the Court of Probate, should be applied for to that court—not to this. *In re Estate of David Stegman*, 71.

*Bond.*]—3. On a bond given to executors, they may sue either as executors, or in their own right. *Executors of Davis v. Davis*, 551.

*Money had and received.*]—4. When money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors as money had and received to the use of the



testator. *Executors of Innes v. Brown*, 665.

### EXEMPLIFICATION.

See CROWN GRANT, 2.

### EXHIBITS.

See EVIDENCE, 2.

### FALSE IMPRISONMENT.

1. In trespass for false imprisonment, a plea justifying the imprisonment under a *Ca. Re.* from a district court, but not stating an affidavit to have been filed on which such writ was issued, *held* bad on demurrer. No objection lies to a replication to such a plea—"that there was no affidavit of a debt certain duly made and filed," on the ground that it involves a negative pregnant. *Ferris v. Dyer & McDonell*, 5.

2. A private individual cannot arrest on suspicion of felony; he must shew a felony committed. *Ashley v. Dundas*, 749.

### FELONY.

See FALSE IMPRISONMENT, 2.

### FI. FA.

See ATTAINDER, 1—COGNOVIT, 1. EXECUTION.

*Return.*]—1. It is not improper for a sheriff to return to a writ of *Fi. Fa.* that he has made the money and paid it over to the plaintiff's attorney, the words in italics being mere surplusage. *Doyle v. Bergin*, 524.

*Return.*]—2. An insufficient return to a *Fi. Fa.* is as no return, and the course is to move for an attachment, not to quash the return. *Eastwood et al. v. McKenzie*, 708.

### FOREIGN JUDGMENT.

1. Evidence of one witness that he had seen the seal of a foreign court, and believed the seal affixed to document produced to be the seal of that court; and of another witness, that he had been to the office of the foreign court and compared the seal which was shewn him by an officer of the court with that produced in evidence; *Held*, sufficient *prima facie* evidence of the judgment. Where a foreign judgment awards a certain debt and costs to be taxed, *Held* that such costs were recoverable in an action on the judgment, on proving the amount at which they were afterwards taxed. *Hall v. Armour*, 3.

2. A foreign judgment is not proved by a certificate of the clerk of the court that judgment had been rendered in the suit for such a sum in favor of the plaintiff. *Norton, Administrator, v. Post*, 137.

### FORCIBLE ENTRY.

*Forcible entry and detainer—Inquisition under 6 H. VIII. ch. 9.*]—An inquisition for a forcible entry, taken under 6 H. VIII. ch. 9, must shew what estate the party expelled had in the premises; and if it do not the inquisition will be quashed, and the court will award restitution. The inquisition is also bad if it appear to the court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of forty shillings, or that the party complaining was sworn as a witness. *Mitchel v. Thompson, and Rex v. McKreavy et al.*, 620.

### FRAUDULENT MISREPRESENTATION.

See EVIDENCE, 5.—STATUTE OF LIMITATIONS, 2.



## GAOL LIMITS OF TORONTO.

The gaol limits of the City of Toronto do not include the liberties of the city. *King v. Latham*, 488.

## HIGH TREASON.

See *ATTAINDER*, 1.

## HUSBAND AND WIFE.

See *DEED*, 2.—*VARIANCE*, 1.

## INDORSER.

See *BILLS OF EXCHANGE*, 4 & 10.

## INFANCY.

*Infancy* is not an inevitable difficulty within the fifteenth section of the Registry Act, so as to preclude the necessity of an infant devisee registering the will within six months of the death of the deviser, to avoid a conveyance by the heir at law. *McLeod v. Truax*, 455.

## INFORMATION.

1. In an information for an intrusion the venue may be laid in any district. *Attorney General v. Dockstader*, 341.

2. A criminal information must be signed by the master of the crown office. *Regina v. Crooks*, 733.

*Libel—Joint-Publication.*—3. A joint action may be maintained against several persons for the joint-publication of a libel. *Brown v. Hirley et al.*, 734.

## INQUISITION.

See *FORCIBLE ENTRY*, 1.

## INSOLVENT.

1. Rule for the weekly allowance will be granted, on an affidavit that defendant is not worth £5 except his necessary wearing apparel. *Malone v. Handy*, 75.

2. A defendant in custody in execution for a sum exceeding £100 is not entitled to be discharged under the statute 5 Wm. IV. ch. 3, unless he has been upwards of twelve months in confinement in the gaol. *Denham v. Talbot*, 79.

3. It is no excuse for not paying the weekly allowance pursuant to an order, that defendant had it paid at the suit of another plaintiff, or that another co-defendant is not in custody and put in bail after the order granted. *Truscott et al. v. Walsh, Holland and Hutchings*, 79.

4. An insolvent charged in execution on a judgment for seduction is entitled to relief under the statute 5 Wm. IV. ch. 3. *Perkins v. O'Connelly*, 80.

5. Payment of the weekly allowance, after a defendant in custody has filed his answers to interrogatories, is a waiver of any objections to the answers; and the plaintiff has no right to file further interrogatories without leave of the court. *Malone v. Handy*, 310.

6. A defendant is entitled to his discharge under 5 Will. IV. ch. 3, on satisfying the court that he has been in close custody more than three months, for a debt not exceeding £20, exclusive of costs. *King v. Keogh*, 326.

## INSURANCE.

1. In an action against an insurance company for a loss by fire, the declaration averred that certain affidavits required by the conditions of the policy were made by A. B. and C. D. *Held*, that proof of affidavits by such parties was indispensable, as well as that the affidavits should strictly conform to the terms of the policy. *Alderman v. West of Scotland Insurance Company*, 37.



## INTERLOCUTORY JUDGMENT.

1. The court will set aside an interlocutory judgment after the lapse of a year, in case the defendant not having appeared the plaintiff has neglected to file common bail for him. *Lane v. McDonell*, 335.

2. It is not irregular to sign interlocutory judgment in the office of a deputy clerk of the crown in the country, when by rule of court the principal office in town is not open. *Hall v. Hunter*, 705.

## INTERROGATORIES.

See INSOLVENT, 5.

## INTRUSION.

See INFORMATION, 1.

A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the Crown, after grant made, is not a disseisin of the grantee. *Doe ex dem. West v. Howard*, 462.

## IRREGULARITY.

See ARREST, 1.

1. When there were two defendants, one of whom appeared by attorney and the other did not appear, but the declaration and other papers by both defendants were served on the attorney for the one, the court held the proceedings irregular. *Huff v. McLean & Hopkins*, 69.

2. If a defendant lie by and allow plaintiff to take several steps, he thereby waives previous irregularities in the proceedings; he should have taken the earliest opportunity of excepting to them. And if he move a judge in chambers, he must state all the irregularities he relies on, and cannot afterwards in term resort to other irregularities, which existed at the time of the

application to the judge, but were not then objected to. *Arnold v. Fish*, 140.

3. In an action against several, if the plaintiff's proceedings be irregular as to some, and he proceed to trial with notice of the irregularity, and obtain a verdict, he cannot sustain it by entering a *nolle prosequi* after trial as to those defendants against whom his proceedings were irregular. *Campbell v. Bruce et al.*, 334.

## JOINT LIABILITY.

See ARREST, 1.

## JOINT PUBLICATION.

See INFORMATION, 3.

## JUDGE'S ORDER.

See AFFIDAVIT TO HOLD TO BAIL, 1.

## JUDGMENT.

See ARREST, 3.—ARREST OF JUDGMENT, 1.—EXECUTION, 1.—INTERLOCUTORY JUDGMENT.—TITLE, 2.

Where a verdict has been taken by consent for plaintiff subject to a reference, the court will not, on account of a failure in the arbitrators to make an award, allow judgment to be entered for the verdict, though such failure be imputed to the defendant. *Watson v. Fothergill*, 135.

## JUDGMENT AS IN CASE OF NON-SUIT.

1. Under peculiar circumstances, the court will refuse to grant judgment as in case of non-suit, for not going to trial pursuant to notice. *Dunn v. McDougall*, 341.

*Practice.*]—2. A rule for judgment as in case of a non-suit cannot be ob-



tained, where there has been a trial ; and, if obtained, and the plaintiff enter into a peremptory undertaking, he is not bound by it. *Warren v. Smith*, 728.

### JUDGE IN CHAMBERS.

A judge in chambers has power to set aside a judgment in ejectment, and the *hab. fac. poss.* thereon issued. *Popplewell ex dem. Capreol v. Abbott*, 245.

### JURAT.

See AFFIDAVIT, 1.

### JUROR.

See ARREST, 2.

### JURY.

*Special jury improperly struck—Waiver.*—Where a special jury was improperly struck, but the defendant's attorney was present and made no objection: *Held*, that he could not afterwards, on that ground, move for a new trial. *Shipman v. Birmingham et al.*, 442.

### JUSTICES OF THE PEACE.

See BAIL, 7.—QUARTER SESSIONS, 1.

### LEASE.

See COVENANT, 1.—CROWN GRANT, 1.—DAMAGES, 1.—EXECUTION, 2.

*Covenant to quit premises at the expiration of the term.*—1. Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time: *Held*, that on ejectment brought by the lessor at the end of the term, the lessee could not set up a former lease to himself for a longer period. *Doe ex dem. Wimburn v. Kent*, 437.

2. A lease for life for a nominal

rent, not under seal, although it cannot pass a freehold interest, will operate as a lease from year to year, and the lessee cannot be dispossessed without six months' notice to quit. *Doe dem. Lawson v. Coutts*, 499.

*Over-holding tenant.*—3. Where a tenant holds over after the expiration of his lease, his landlord has a right to take possession of the premises, if he can, without a breach of the peace. *Boulton v. Murphy*, 731.

### LEGACY.

See DEVISE, 1.

*Will—Assent of Executor—Trespass.*—The assent of executors to a legacy may be by implication as well as by express words, and in this case it was held to be sufficiently shewn by their conduct. Where the testator devised his house to his wife for life, and also left her some personal property, and the executors, in her absence, entered the house to make an inventory of the property, and afterwards turned out her daughter and shut up the house: *Held*, on trespass brought by the wife, that this was sufficient proof for the plaintiff, under an issue joined upon the fact of excess. *Honsberger v. Honsberger et al.*, 479.

### LETTERS PATENT.

See CROWN GRANT.—ESTOPPEL, 1.

### LIBEL.

See COSTS, 5.—INFORMATION, 3.

1. A petition to the Lieutenant Governor complaining of the conduct of Commissioners of the Court of Requests, and charging them with partiality, corruption and connivance at extortion, signed by a number of persons and praying for redress, is an absolutely privileged communication in its nature, and no action for libel



will lie upon it, though the defendant had circulated it and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description.—*Stanton v. Andrews*, 211.

2. In case for slander, words stated in the declaration as if narrated by the defendant in the third person are not supported by proof of words spoken by him in the first person. *Phillips v. Odell*, 483.

*Words imputing arson—Action when maintainable.*—3. An action cannot be maintained for words spoken imputing the crime of arson to the plaintiff, when from the evidence it appeared that the burning of the building of which the plaintiff was accused would not have constituted such crime. *McNab v. McGrath*, 516.

*Slander—Proof.*—4. Where the words charged were “you robbed the mail;” and those proved, “I am not like you—running about the country with forged deeds, and robbing the mail, as you did:” *Held*, that the variance was fatal. *McBean v. Williams*, 689.

## LICENSE OF OCCUPATION.

See EJECTMENT, 7.

## LIEN.

See TITLE, 3.

A builder has no lien for payment upon a house erected by him on the land of his employer. Where A. contracted to build a house for B., and to deliver possession thereof when finished, upon which he was to be paid: *Held*, that no action would lie to recover the price until an absolute and unreserved delivery of the house had taken place, and that he had not a right to withhold the key of the

house until he had received payment, though B. had not acquired any title to the land on which it was built. *Johnson v. Crew*, 200.

## LIMITS.

See BOND, 3.

## LINE FENCES.

The statute of 4 Wm. IV. ch. 12. for regulating line fences, does not operate to overrule or disturb any agreement made between parties respecting division fences between them. It comes into effect in the absence of any such agreement, and where parties dispute on which of them the obligation to make or repair such division fences lies. *Lamb v. Mulholland et al.*, 109.

## MALICIOUS ARREST.

1. Case will lie for maliciously holding a man to bail on the affidavit that “he was apprehensive the said A. B. would leave the province,” &c., if strong ground be shewn negating the existence of any such apprehension. *Dunn v. McDougall*, 158.

*Averment of determination of former suit, and endorsement of ca. re.*]

—2. In a case for malicious arrest the determination of the suit is sufficiently averred by stating that “the plaintiff (the defendant in the original suit) recovered a certain sum for damages and costs” under the provincial statute 2 Geo. IV. ch. 5, allowing a verdict and judgment for defendant in set off, “and that the defendant was in mercy, &c.,” without averring also, “that the defendant took nothing by his writ;” and an averment that the defendant maliciously obtained a judge’s order to arrest the plaintiff, and issued a writ of *Ca. Re.*, and endorsed it for bail,



shews sufficiently that the writ was endorsed under the order. *Wilcox v. Burnside*, 328, and *ibid*, 525.

MANDAMUS.

*General principle as to issuing.*—A mandamus never issues except to admit or restore some person to an ascertained right. *In re application of Barnhart, formerly Gaolor of the Home District v. The Justices of the Home District*, 507.

MARRIED WOMAN.

See DEED, 1.

MILL-DAM.

See ARBITRATION AND AWARD, 3.

MINOR.

See EJECTMENT, 1.

MONEY HAD AND RECEIVED.

See EXECUTOR.

Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors. *Smart et al. v. Brown*, 650.

MORTGAGE.

See STATUTE OF LIMITATIONS, 1.

1. The court refused to interfere in a summary manner to stay proceedings in an action of covenant on a mortgage to secure money—brought for the benefit of an assignee—though it was shewn that the mortgagee had signed a writing not under seal, by which he acknowledged that the instalments mentioned in the mortgage were for a larger sum than was really due. *Baby v. Milne*, 76.

2. A. mortgaged lands in fee to B.,

and before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mortgage. No re-conveyance from B. to A. was proved. C. went into possession and continually held, till about 13 years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mortgage. *Held*, that D. was not entitled to recover in ejectment, and that if necessary a re-conveyance from B. to A. might be presumed. *Doe ex dem. McLean v. Whitesides*, 92.

3. H. having purchased a lot of land and paid several instalments of the purchase money, but, having received no deed, assigned his right to B. taking a bond from him, that if he should obtain the deed on the payment by A. to him of £100 in two years he would convey the land to A. *Held*, on ejectment brought by B., the two years having expired, that A. could not treat the bond as a mortgage and redeem the payment of principal interest and costs under 7 Geo. II. ch. 20. *Doe Shannon v. Roe*, 484.

NEW TRIAL.

See ABSCONDING DEBTOR, 1—JURY, 1.—NOTICE OF TRIAL, 2.—TRESPASS, 6.

*Error in survey.*—1. When a witness, a surveyor, founded his evidence upon the assumption of a certain monument as the correct point to start from in running a line, and the jury gave their verdict accordingly, and such witness afterwards discovered he was in error as to the correctness of that boundary, and made affidavit of his mistake, the court granted a new trial. *Doe ex dem. Case v. Magill*, 56.

*Usury.*—2. Debt on bond; defence, usury—and verdict for plaintiff. In an action for ejectment on a mortgage



given to secure the same debt, the jury found for defendant on the same evidence. The court refused to set aside the verdict on the bond, though the judge who tried the cause thought the evidence strong to establish usury. *Wilson v. Hill*, 56.

*Case taken out of order.*—3. It is not a sufficient ground for setting aside a verdict that the case was tried out of its order, and in the absence of the defendant's attorney and counsel, unless it be further shewn that the defendant had some defence, which it is proper he should have an opportunity of urging. *Doyle v. Fraser*, 59.

*Trespass.*—4. In trespass *qu. cl. freg.* defendant pleaded *liberum tenementum*, and on the trial the jury gave £5 damages for plaintiff, against the judge's charge. The verdict being contrary to law, *Held* that the smallness of damages was no reason against a new trial, because the verdict if it stood would be conclusive on the parties as to their rights. *Soper v. Marsh*, 68.

5. A new trial will be granted when the case appears very doubtful on the evidence, and the party against whom the verdict is given would be concluded by it. *Whethen et al. v. Coverley*, 71.

6. After two concurring verdicts in a case doubtful upon the evidence, and where there is good reason to be satisfied with the conclusion the jury have come to, the court will not grant a new trial. *Terribery v. Miller*, 129.

7. The court will not grant a new trial upon an objection to the jury having been summoned by a relation of either party, when the objection was known before the trial to the opposite party, and waived. After two verdicts in a doubtful case and upon a question of fraud, the court will not grant another trial, unless it is absolutely clear that the verdict was wrong.

*Power et al. v. Rutlan, Esq., Sheriff*, 132.

*Executor.*—8. In a particularly hard case, the court will relieve an executor who has omitted to plead "*plene administravit*," by granting a new trial and amending his pleadings, on payment of costs. *McMartin v. Troveller*, 155.

9. It is no ground for a new trial, that a witness who was subpœnaed did not attend, having been engaged on some public works. *Woodruff v. Campbell*, 305.

*Costs.*—10. When a case has been called on and tried at Nisi Prius in the absence of the defendant's counsel, a new trial will be granted only on payment of costs. *Driscoll v. Hart*, 677.

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## NOLLE PROSEQUI.

See IRREGULARITY, 3.

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## NONSUIT.

See ESCAPE, 2.—JUDGMENT AS IN CASE OF, 1 & 2.—NOTICE OF TRIAL, 2.—PRACTICE, 9.

1. Plaintiff declared on a promissory note with common counts; he gave particulars for goods sold and delivered. The defendant disputed the note as a forgery; and at the trial the plaintiff proved the note, and gave evidence to shew it genuine, and the defendant cross-examined to destroy it—and on plaintiff closing his case, moved for and obtained a nonsuit, on the ground that the note was not included in the bill of particulars. A new trial was granted without costs. *Bigelow v. Sprague*, 65.

2. A plaintiff cannot elect to take a non-suit after a verdict is rendered for the defendant, but before it is recorded.

3. A plaintiff may be non-suited although his evidence supports his



pleadings. *McPherson et al. v. Hamilton*, 490.

### NOTICE OF TRIAL.

1. Notice of trial given in lieu of a notice of assessment, is irregular. *Bilings et al. v. Reid*, 73.

2. Where notice of trial had been served late—and defendant immediately on being apprised of it took steps to procure his witnesses, and arrived with them an hour or two after the cause had been tried, having been detained on the road by bad weather,—the court granted a new trial, it being suggested on affidavit that defendant had merits. *Harrington v. O'Lone*, 78.

3. Where the defendants filed a sham demurrer, which was argued before a judge at chambers as a dilatory plea—*Held*, that the defendants were still entitled to short notice of trial, although there was not sufficient time to give it before the next assizes, owing to the delay occasioned by the demurrer. *Truscott et al. v. Goldie et al.*, 138.

4. It is not a sufficient service of a notice of trial to leave it at the attorney's office, no person being there. *Brewer v. Bacon*, 343.

5. In an action defended by the Crown, notice of trial was served on the Attorney General, who had previously been raised to the bench. *Held*, that such notice was a nullity. *Doe ex dem. McMillan v. Duane et al.*, 676.

### NUL TIEL RECORD.

See BAIL, 4 & 5.

### OVER-HOLDING TENANT.

See LEASE, 3.

### OYER AND TERMINER.

See CRIMINAL LAW, 1.

### PARLIAMENT.

A member of the House of Assembly has privilege of being sued by summons, and not by writ of *ca. re.* *Phelps v. McKenzie, M. P. P.*, 80.

### PARTNERSHIP.

*Trover by one partner against another.*]—1. One partner cannot maintain trover against another, for converting the partnership property. *Smith v. Book*, 556.

*Contract.*]—When a contract was made with one party, who subsequently admitted another person to a share in the contract, *Held*, that payment to the original contractor is sufficient, and that no notice need be taken of the subsequent co-partnership. *Carlisle et al. v. The Niagara Dock Company*, 660.

*Non-joinder.*]—3. In an action for goods sold and delivered, the non-joinder of a dormant partner is not fatal. *Briggs v. Bower*, 672.

### PATENT.

See CROWN GRANT.

### PEREMPTORY UNDERTAKING.

See JUDGMENT AS IN CASE OF NON-SUIT, 2.

### PLEADING.

See ARBITRATION AND AWARD, 1 & 2.—BAIL, 4.—BILLS OF EXCHANGE, 5.—BOND, 1 AND 3.—COMMON COUNTS, 1.—DOWER, 2.—ESCAPE, 1.—EXECUTOR, 1.—LIBEL, 2.—MALICIOUS ARREST, 2 & 3.—PARTNERSHIP, 3.—REPLEVIN, 1.—REQUEST, 1.—TENDER, 1.—TRESPASS, 1, 2, 3, 4.

1. In declaration for an escape on a writ issued from a District Court the making and filing of an affidavit of debt must be alleged. *Wragg v. Jarvis, Sheriff*, 113.



*Covenant for title—Breach—Plea of no eviction.*—2. In action of breach of covenant for good title, a plea that the defendant was the rightful owner (in the words of the covenant), and that the plaintiff entered upon and took possession of the premises, and never has been evicted, is bad on demurrer; as is likewise a plea that the plaintiff, before and at the time of the delivery of the indenture, was in possession and has not been evicted. *Vanderburgh v. Vanalstine*, 454.

*Bond—Profert.*—When a bond is pleaded with a *profert*, the admission of its execution under a judge's summons for that purpose does not dispense with the necessity for its production at the trial, but only with the necessity of proof of execution. *Lesslie v. Leahy*, 482.

*Bail—Plea that after ca. sa. issued the plaintiff gave notice to the sheriff not to arrest their principal.*—4. A plea by bail to an action on their recognizance, that after the issuing of the *Ca. Sa.* against their principal the plaintiff gave notice to the sheriff not to arrest him, is bad on general demurrer. *Burns v. Donnelly and Kay*, 495.

5. A plea by bail to an action on their recognizance that they did not become bail, concluding to the country, is bad on special demurrer.—*Burns v. Grier et al.*, 500.

6. A replication *de injuriâ* to a justification under a warrant is good. *Blair v. Bruce*, 524.

*Assault and battery—Plea of "son assault demesne"—Replication thereto.*—7. To a plea of *son assault demesne* to a declaration for assault and battery, a replication that the defendant committed a breach of the peace, and that the plaintiff, being a constable and having view thereof, arrested him, is a good answer. *Fido v. Wood*, 558.

8. Debt on bond—condition "that if A. gives B. a good and sufficient deed in fee simple of &c., and as soon as the said B. pays up a note of hand this day given to said A. in payment of said land, then, &c." The defendant (A.) pleaded that he was willing and offered the plaintiff to give him a deed for the said land on his (the plaintiff) paying up the said note of hand, but that the plaintiff did not require and forbade the plaintiff to give said deed, and that plaintiff declared to defendant that he would not nor did he ever pay up said note, and plaintiff discharged defendant from giving him a deed, for which reason, and no other, defendant did not give the deed. *Held*, plea bad on demurrer. *Macaulay, J.*, dissenting. *Campbell v. Burr*, 630.

*Sheriff—Non-return of writ.*—9. In an action against a sheriff and his sureties, on their covenant for the due performance of his duty, for not returning a writ of *Fi. Fa.* and the money made thereon, it is necessary to set out the recovery of the judgment which warrants the issuing of the writ. *Bidwell, Executor of Bidwell, v. McLean et al.*, 690.

*Arbitration and award—Declaration averring award made on day appointed—Plea, no award—Replication varying from declaration as to time.*—10. When to a declaration in debt on a submission bond with an averment that the award was made on the day appointed, the defendant pleaded "no award," and the plaintiff replied an award within the time—to wit, on a day and year different from the year stated in the declaration—the replication was held sufficient on general, though it would have been bad on special demurrer. *Judge v. Judge*, 692.

*Pleading—Party suing in a representative capacity.*—Where a plaintiff sues in a representative char-



acter, the cause of action must be stated in the declaration to have accrued to him as such representative. *Ham et al. v. Madden et al.*, 729.

*Pleading—Request.*]—12. Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request must be averred, but the statement of a general request will be sufficient after verdict. *Daily v. Stevenson et al.*, 737.

## PORT HOPE (TOWN OF)

See BY-LAW, 1.

## POSSESSION.

See EJECTMENT, 2.—SEISIN, 1.—  
STATUTE OF LIMITATIONS, 1.—  
TITLE, 2.

## POUNDAGE.

Where an execution against lands was put into a sheriff's hands before the return day—but it was not shewn that the sheriff did anything upon it—and the plaintiff and defendant compromised: *Held*, that the sheriff was not entitled to poundage on such execution, although the defendant had lands within his district which might have been taken upon such writ and sold. *Leeming et al., Executors of—Leonard, Sheriff, v. Hagerman, one, &c.*, 38.

## PRACTICE.

See COSTS, 7.—DOWER, 1.—EJECTMENT, 3 AND 5.—INFORMATION, 1 AND 2.—INTERLOCUTORY JUDGMENT, 1 AND 2.—IRREGULARITY, 1 AND 3.—NEW TRIAL, 3.—NOTICE OF TRIAL, 4.—SATISFACTION, 1.

1. The court set aside an assessment of damages, where the record was not entered till the morning of the second day of the assizes: there being no assent on the part of the defendant. *Hall v. Griswold*, 136.

*Service of papers.*]—2. It is irregular to serve papers on an attorney's clerk, at a distance from the attorney's residence or place of business. *Tiffany v. Bullen*, 137.

*Declaration—Attorney's name.*]—3. It is not necessary that an attorney's name should be subscribed to a declaration, if it be stated in the commencement. *Crooks et al. v. Davis*, 141.

*Points reserved.*]—4. When points are reserved at a trial and endorsed on the record, but the judge makes no entry thereof on his notes, the record must govern, and judgment cannot be entered until the points are disposed of. *Taylor v. Taylor*, 489.

5. Where the plaintiff had lost a trial by the defendant having pleaded in abatement, and the latter moved to be allowed to withdraw his plea in abatement and plead to the action, the court granted the new application provided that the defendant could produce affidavits to shew that he had a meritorious defence. *Skillington v. Baby*, 574.

*Amendment.*]—6. The plaintiff recovered a verdict at *Nisi Prius*, which was set aside in term. He then moved to amend his declaration, by adding two new counts; and leave was granted on payment of the costs of the former pleading and of the application. *Kingsmill et al. v. Brown*, 591.

7. In an action of replevin where the court below found in favor of the plaintiff on demurrer to the first cognizance, and in favor of the defendant on demurrer to his replication to one of several pleas in bar of the second cognizance, and a general judgment was therefore given in defendant's favor, awarding damages and a return of the goods: *Held*, on appeal, that such judgment was erroneous. *Rea v. Gilliland*, 649.



*Plea in abatement.*—8. A plea in abatement must be filed within four days from demand. *Richmond et al. v. Sewell*, 673.

*Peremptory undertaking.*—9. The motion to discharge a rule for judgment as in case of a non-suit, on the peremptory undertaking, must be made in open court and supported by affidavit. *Hollister v. Barnhart*, 719.

### PRESENTMENT.

See *BILLS OF EXCHANGE*, 1 AND 2.

### PRETENDED TITLE.

Leave was granted to compound on the statute Hen. VIII for buying a pretended title on paying the King's share into the court. *May qui tam v. Detrick*, 77.

### PRINCIPAL AND SURETY.

*Change of office for which security is given—Surety no longer responsible.*—1. A surety by bond for the due performance of the office of bank agent is not responsible for losses occurring after the nature of the agency has been changed, and the agent appointed a cashier. *Bank of Upper Canada v. Covert et al.*, 541.

2. A surety cannot sue a co-surety jointly with the principal, for the amount of a debt of the principal which the surety has been obliged to pay. *Burnham v. Choat et al.*, 736.

### PRIORITY.

See *ABSCONDING DEBTOR*, 2.

### PRIVILEGE.

See *ARREST*, 1.

### PRIVILEGED COMMUNICATION.

See *LIBEL*, 1.

### PROBATE.

See *EXECUTOR*, 1.

### PROCESS.

A true copy of non-bailable process must be served on a defendant. *Scott et al. v. Heffernan*, 321.

### PROFERT.

See *PLEADING*, 3.

### PROMISSORY NOTES.

See *BILLS OF EXCHANGE*.

### QUARTER SESSIONS.

*Appeal.*—On an appeal to the quarter sessions under the statute 4 Wm. IV. ch. 4, evidence differing from or additional to that produced before the convicting justices may be received and go to the jury. *Rex v. Justices of Bathurst*, 74.

### QUIET ENJOYMENT.

See *COVENANT*, 1.

### RECORD.

See *AMENDMENT*, 1.

### REDEMPTION.

See *TAXES*, 2.

### REGISTRY.

See *DEED*, 1.—*INFANCY*, 1.

### RELIGIOUS SOCIETIES.

Where real property was given by deed in trust for the Methodist Episcopal Church in Canada, according to the rules adopted by the General Annual Conference, and that when any of the trustees or their successors should cease to be a member of that church that such trustee should



vacate his trusteeship; and at a general conference the majority did away with Episcopacy, and having appointed new trustees, claimed the property from the old trustees, who adhered to the Episcopacy, on the ground that by not conforming to the rules of the general Conference they had ceased to be trustees according to the terms of the trust deed, and the new trustees took possession of the property: *Held*, on ejectment brought by the old trustees, that they were entitled to recover, the Conference having no power to do away with Episcopacy, and the old trustees, by continuing in the original church, having complied with the terms of the deed. *Doe ex dem. the Trustees of the Methodist Episcopal Church in the Township of Kingston v. Bell*, 344.

*Trespass against a trustee who had ceased to be a member.*—2. Trespass was held to be maintainable by the trustees of a Methodist chapel against a person who was a trustee, but having ceased to be a member of the society could not hold the trust under the provisions of the deed which created it; and some of the plaintiffs, who were not the original trustees, but had been elected as their successors under the same provisions, were properly joined in the action. *Everett et al. v. Howell et al.*, 592.

### REPLEVIN.

See PRACTICE, 7.

*Distress for rent—Evidence.*—In replevin, under the plea of *non tenuit* to an avowry for rent in arrear, the plaintiff may show an eviction. *Cormack v. Bergen*, 561.

### REPLICATION.

See PLEADING, 6.

### REPUGNANCY.

See ARBITRATION AND AWARD, 4.

### REQUEST.

See PLEADING, 10.

The omission of an averment of a special request, where required, is matter of form only, and cannot be objected to on general demurrer. *McLeod v. Jackson*, 318.

### RETURN.

See FI. FA., 1.

### SATISFACTION.

A. being in execution at the suit of B., recovered judgment against B. for a sum smaller than that for which he was charged in execution. *Held*, that the proceedings in this cause might be stayed on satisfaction being entered on B's judgment for the sum recovered by A. against him. *Bethune v. Brown*, 332.

### SEDUCTION.

See INSOLVENT, 4.

### SEISIN.

See DOWER, 2.—TITLE, 2.

Seisin in fee cannot be presumed from a mere constructive possession, but from an actual visible possession only. *Doe ex dem. Morgan v. Simpson*, 335.

### SEIZURE.

See SHERIFF, 1.

*Seizure by sheriff—Abandonment.*—A chattel was seized by the sheriff and lent by him before the return of the writ. *Held*, no abandonment. *Hamilton v. Bouek*, 664.

### SET OFF.

Plaintiff agreed with defendant after action brought, that if defendant would take a note which plaintiff had given to a third person, it should be allowed for on account of this action. Defendant did so, and by such payment



and other items of set-off accruing before action brought over-balanced plaintiff's demand. *Held*, that plaintiff was still entitled to a verdict with nominal damages, which would carry full costs. *Sherwood v. Campbell*, 2.

### SHERIFF.

See ATTACHMENT, 2 AND 4.—ESCAPE, 2 AND 3.—EVIDENCE, 3.—FL. FA., 1.—NEW TRIAL, 7.—PLEADING, 1 AND 9.—POUNDAGE, 1.—SEIZURE, 1.—TRESPASS, 5.

1. In trespass against a sheriff for seizing goods in execution, it is not enough to call the bailiff who made the seizure, and prove by him that he had a warrant, without producing it, or giving some satisfactory account of it to excuse its non-production. *Lowes v. Jarvis, Sheriff*, 134.

2. The sheriff's warrant to a bailiff to arrest must be endorsed with the amount of the debt claimed and costs, in like manner as the writ is required to be. *Steele v. Lameux*, 154.

*Escape—Liability of sheriff when arrest made by bailiff without warrant—Duty of sheriff charged with an arrest.*—A sheriff is not liable for an escape when a bailiff arrests a debtor without any warrant against him, although the bailiff has the writ in his possession. When the sheriff goes to the known residence of a debtor and *bonâ fide* searches for him to make an arrest, without success, because the debtor has absconded, he has done all that is required; and he is not liable for not arresting after the debtor's return, unless it be shewn that he had notice of such return. *Rigney v. Ruttan*, 707.

### SHERIFF'S DEED.

The deed of land sold for taxes may be made by the sheriff to the assignee of the highest bidder. *Doe dem. Bell v. Orr*, 433.

### SIDE LINES.

Where parties run the side lines between their respective lots, and possess the land on either side according to such side lines for twenty years and upwards, such possession is confirmed by the Statute of Limitations, although on a survey made according to the statute of 1818 it may turn out that the lines run in the first instance, and according to which the possession has been, are erroneous. *Dennison v. Chew*, 161.

### SPECIAL BAIL.

See BAIL, 1.

### SPIRITUOUS LIQUORS.

A shop-keeper may recover for spirituous liquors sold in less quantities than to the value of twenty shillings sterling at a time. *Leith v. Willis*, 101.

### STATUTES (CONSTRUCTION OF).

- 6 Edw. I. ch. 5.—See "Waste."
- 6 Hen. VIII. ch. 9.—See "Forcible Entry."
- 5 Geo. II. ch. 7.—See "Evidence."
- 2 Geo. IV. ch. 5.—See "Malicious Arrest."
- 2 Geo. IV. ch. 13.—See "Account Stated."
- 4 Geo. IV. ch. 17.—See "Welland Canal."
- 2 Wm. IV. ch. 5.—See "Absconding Debtor"—"Attachment."
- 4 Wm. IV. ch. 1.—See "Deed"—"Side Lines"—"Statute of Limitations."
- 4 Wm. IV. ch. 4.—See "Quarter Sessions."
- 4 Wm. IV. ch. 12.—See "Line Fences."
- 5 Wm. IV. ch. 3.—See "Insolvent."

### STATUTE OF FRAUDS.

See TRESPASS, 7.

### STATUTE OF LIMITATIONS.

See EVIDENCE, 5.—SIDE LINES, 1.



*Mortgage satisfied after twenty years' possession subsequent to default.*—When the mortgagor is in possession, a mortgage may be presumed satisfied when twenty years have elapsed from the time of the payment of the mortgage money. *Doe ex dem. McGregor v. Hawke*, and *Doe ex dem. McGregor v. Crow*, 496.

*Fraudulent misrepresentation.*—2. In case for fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damage accrued. *Dickson v. Jarvis*, 694.

### SURETY.

See PRINCIPAL AND SURETY.

### SURVEY.

See NEW TRIAL, 1.

*Description.*—The front half of a lot supposed to contain in all two hundred acres, but in reality consisting of more, was construed to mean half the real quantity. *Ellis v. Waddel et al.*, 639.

### TAXATION OF COSTS.

See ATTORNEY, 2 AND 4.

### TAXES.

1. Land which has not been described by the Surveyor-General is not liable to be sold for taxes. *Doe dem. Bell v. Orr*, 433.

*Redemption.*—2. The defendant, as treasurer, returned the plaintiff's land as part of a tract on which taxes were unpaid. The plaintiff tendered the amount of the taxes on his own portion, which the defendant refused to accept, and the land was sold by the sheriff. *Held*, that an action would not lie against the

treasurer for not accepting the redemption money, the tender to and refusal by the latter of the money being equivalent to payment, and that therefore the plaintiff had not lost his land. *Cunningham v. Markland*, 645.

### TENANT.

The stat. 4 Will. IV., ch. 1, sec. 53, does not authorise a writ against a mere tenant at will, though he continue to hold after notice to quit and demand of possession. The statute extends only to tenants holding after the expiration of their time. *Clement v. Schriver*, 310.

### TENDER.

See BOND, 2.—DAMAGES, 1.—TAXES, 2.

1. A sheriff sent his clerk to plaintiff's attorney before action brought, saying that certain monies collected on an execution in favor of plaintiff were ready to be paid: the clerk had not the money with him, nor did he offer to go for it; but the attorney said he would not receive it without the costs of a rule on the sheriff to return the writ were also paid. *Held*, that these facts would not sustain a plea of tender. *Thompson v. Hamilton, Esq. Sheriff*, 111.

*Plea.*—2. A plea of tender and refusal, and that the defendant was always ready to pay at a particular place, held sufficient, on general demurrer. *Thompson v. Hamilton, Sheriff of Niagara*, 443.

### TERM FOR YEARS.

See EXECUTION, 2.—LEASE.

### TITLE.

See CROWN GRANT, 2.—EJECTMENT, 2.

1. A purchaser of lands on an execution at a sheriff's sale is entitled to



recover in ejectment against the debtor or his representative without proof of the debtor's title. *Doe Fisher v. Chesser et al.*, 144.

*Seisin.*—2. Possession from which seisin may be inferred must be an actual or visible possession, not merely by construction only. *Doe ex dem. Morgan v. Simpson*, 555.

*Judgment—Lien on lands—Priority of title.*]—3. Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them. A purchaser at sheriff's sale of lands sold on an execution against a devisee takes in preference to a purchaser on a subsequent execution, though prior judgment, against the executors of the testator. *Doe Auldjo v. Hollister*, 739.

## TRESPASS.

See CROWN GRANT, 1.—LEGACY, 1. NEW TRIAL, 4.—RELIGIOUS SOCIETY, 1.—SHERIFF, 1.—VARIANCE, 1.

1. In trespass *quare clausum fregit*, to a plea of soil and freehold in the King, over which was a public allowance for road or highway, plaintiff replied that the soil and freehold was his and not that of the King, *modo et formâ*; *Held*, that this replication put in issue the existence of such a public allowance for road,—*i. e.* a public allowance of which the soil and freehold was in the King. *Hellivell v. Eastwood et al.*, 104.

2. In trespass *quare clausum fregit*, and for taking, cutting and carrying away hay and corn of plaintiff's, and converting, &c., the plea of *liberum tenementum* is not a sufficient answer on demurrer. *Wilcox v. Montgomery*, 312.

3. In trespass against several, if the plaintiff prove a cause of action against all upon one count, and attempts, but

fails in proving, a second trespass on another count, proving it against some of the defendants only, he is nevertheless entitled to recover for the trespass first proved. *Watson v. Riorden et al.*, 322.

*Justification.*]—4. Trespass *quare clausum fregit*, with a count for taking goods. The defendants justified as commissioners and bailiff of the Court of Requests, and the plaintiff replied that he was not duly summoned to attend at the court at which judgment was recovered. *Held*: replication bad on general demurrer. *Stevens v. Cowan et al.*, 572.

*Execution—Chattel mortgage.*]—5. An action for trespass will not lie against a sheriff for seizing goods which were subject to a chattel mortgage, but of which the mortgagors had possession. *Street v. Hamilton*, 658.

*Excessive damages*]—6. In an action of trespass *quare clausum fregit*, the court will interfere when the damages are manifestly excessive. *Jessers v. Markland*, 677.

*Statute of Frauds.*]—7. An agreement to enter upon and clear land, and take the wood after it is cut down in payment of the labour is not for an interest in lands within the Statute of Frauds; and the person clearing the land may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass *quare clausum fregit*. *Hamilton v. McDonell*, 720.

## TROVER.

See PARTNERSHIP, 1.

1. *Quere*—Whether the evidence of the Secretary of the Province, that it appears by an entry in his own handwriting, in a book kept for such entries, that a patent was delivered to A. and



that he therefore felt sure it was delivered to A. or his servant, (but has no recollection of it,) is sufficient to charge A. in trover with the possession of such patent? And whether, if A. obtained this without any direction or authority from the grantee of the crown, but from the direction of some public officer to the secretary to deliver to A. such patents as he should require, such obtaining possession of the patent was tortious and afforded evidence of a conversion at that time? *Hampton v. Boulton*, 23.

2. A. lent a horse to B. for a special purpose, and while B. was using him, consistent with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A., having seen the horse, refused to take him, and went to B's residence (20 miles from where the horse was left,) and demanded him back sound as received. *Held*, that B.'s non-delivery of the horse after thus demanded did not furnish evidence of a conversion, and that A. could not sustain an action of trover for his value under the circumstances. *Wells v. Crew*, 209.

*Conversion—Demand.*]—3. Where a demand is necessary in trover to prove a conversion, if it be verbal, the answer must be positive; and where a verbal demand was made on the defendant while driving at a distance from his house, where the property demanded was, and no answer was returned, *Held*, no evidence of a conversion. *McLean v. Graham*, 741.

### USURY.

See **BILLS OF EXCHANGE**, 14.—**NEW TRIAL**, 2.—**WITNESS**, 4.

### VACANT POSSESSION.

See **EJECTMENT**, 1.

5 H

### VARIANCE.

See **BAIL**, 4.—**LIBEL**, 4.

In trespass for mesne profits, brought by husband and wife, alleging a *joint* recovery, it appeared the recovery in ejectment was by the wife alone. *Held*, a fatal variance. *Ashton and wife v. Keesar*, 328.

### VOIR DIRE.

See **WITNESS**, 2.

### WAIVER.

See **IRREGULARITY**, 2.—**JURY**, 1.

### WARRANT.

See **SHERIFF**, 1 & 2.

### WASTE.

*Waste*—6 *Edward I. ch. 5.*]—An action on the case for waste may be brought, under 6 *Edward I. ch. 5*, by him in remainder for life or years; and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber. *Mary Tayler v. Jane Tayler*, 501.

### WEEKLY ALLOWANCE.

See **INSOLVENT**.

### WELLAND CANAL.

1. The Welland Canal Company may, on assumpsit, recover tolls for the use of the short canal at the mouth of the River Welland which unites that river with the River Niagara near Chippewa, as that short canal forms a part of the Welland Canal. *The Welland Canal Company v. Warren et al.*, 20.

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*Welland Canal*—4 Geo. IV. ch., 17.]—2. The Welland Canal Company have power, under their charter (4 Geo. IV., ch. 17, sec. 3), to let surplus water out of the canal in time of flood; and no action can be maintained for any damage done thereby if the act was necessary for the preservation of the canal. *Griffiths v. Welland Canal Company*, 686.

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WILL.

See DEVISE, 1.

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WITNESS.

See NEW TRIAL, 9.

1. In an action by A. against C., B. is a competent witness to prove that he was copartner with A. in the transaction out of which the action arose, and that C. had paid him. *Wilson v. Stevens*, 321.

2. If a witness be objected to as interested, and on *voir dire* denies any interest, other witnesses may be called to prove that he is incompetent. *Thrasher v. Tulloch*, 326.

3. A joint contractor with the defendant, not joined in the action, may be witness for the plaintiff, and a release (though unnecessary) given by the plaintiff to him immediately before the trial to enable him to give testimony, will not operate as a discharge of the defendant, unless pleaded *puis darrein continuance*. *Boyce v. Park et al.*, 508.

*Debtor, as a witness, proving his own deed void for usury.*]—In an ejectment brought by a sheriff's vendee of lands, sold on an execution against a purchaser from the debtor before execution, in which it was contended that the deed to the defendant was usurious—*Held*, that the debtor was a competent witness to prove the usury. *Doe ex dem. Springsted v. Hopkins*, 579.

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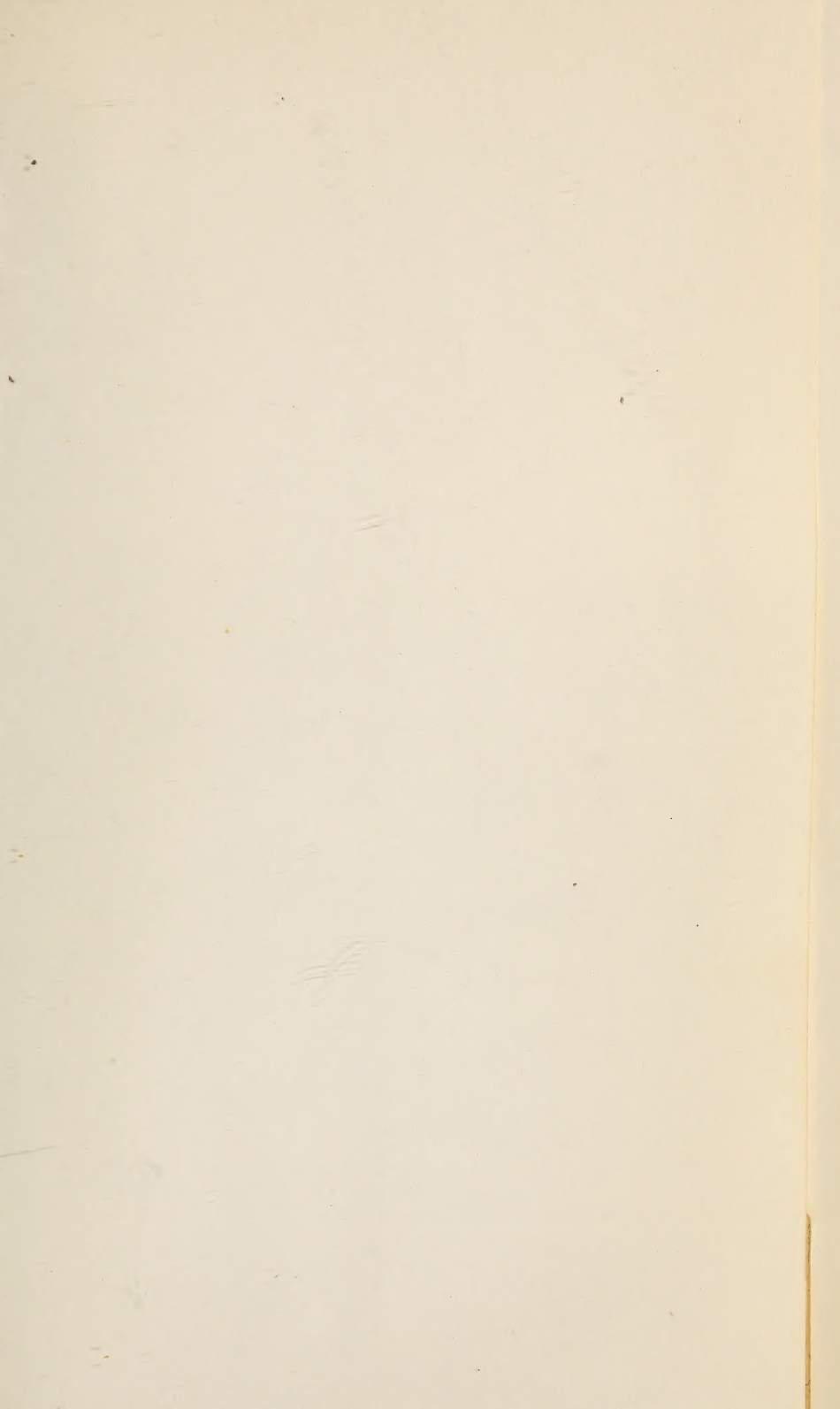


















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